**OECD REVIEWS OF REGULATORY REFORM**

**REGULATORY REFORM IN GERMANY**

# GOVERNMENT CAPACITY TO ASSURE HIGH QUALITY REGULATION


**ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT**

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**AND DEVELOPMENT**

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*Publié en français sous le titre :*

LA CAPACITÉ DU GOUVERNEMENT A PRODUIRE DES RÉGLEMENTATIONS DE GRANDE QUALITÉ

## FOREWORD

Regulatory reform has emerged as an important policy area in OECD and non-OECD countries. For regulatory reforms to be beneficial, the regulatory regimes need to be transparent, coherent, and comprehensive, spanning from establishing the appropriate institutional framework to liberalising network industries, advocating and enforcing competition policy and law and opening external and internal markets to trade and investment.

This report on *Government capacity to assure high quality regulation* analyses the institutional set-up and use of policy instruments in Germany. It also includes the country-specific policy recommendations developed by the OECD during the review process.

The report was prepared for *The OECD Review of Regulatory Reform in Germany* published in July 2004. The Review is one of a series of country reports carried out under the OECD's Regulatory Reform Programme, in response to the 1997 mandate by OECD Ministers.

Since then, the OECD has assessed regulatory policies in 20 member countries as part of its Regulatory Reform programme. The Programme aims at assisting governments to improve regulatory quality — that is, to reform regulations to foster competition, innovation, economic growth and important social objectives. It assesses country's progresses relative to the principles endorsed by member countries in the 1997 *OECD Report on Regulatory Reform.*

The country reviews follow a multi-disciplinary approach and focus on the government's capacity to manage regulatory reform, on competition policy and enforcement, on market openness, on specific sectors such as telecommunications, and on the domestic macro-economic context.

This report was prepared by Peter Ladegaard in the Public Governance and Territorial Directorate of the OECD. It benefited from extensive comments provided by colleagues throughout the OECD Secretariat, as well as close consultations with a wide range of government officials, parliamentarians, business and trade union representatives, consumer groups, and academic experts in Germany. The report was peer-reviewed by the 30 member countries of the OECD. It is published under the authority of the OECD Secretary-General.

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## 1. REGULATORY REFORM IN A NATIONAL CONTEXT

### *1.1. The administrative and legal environment for regulatory reform*

Germany's federal principles and its strong "legal state" (*Rechtsstaat*) tradition have a defining impact on the administrative and legal environment for regulatory reform. Regulatory governance is embedded in a tradition of co-operative federalism, *Rechtsstaat* principles and a high degree of decentralisation and devolution to local governments. In combination, these fundamentals have provided a strong, rule-based and consensus-driven foundation for the regulatory process.

Germany's federal system is characterised by the separation of policy making and implementation functions between the federal and the *Länder* levels and by politically and functionally strong multi-purpose local governments. The allocation of political and administrative functions has been guided by the principle of local self-administration (*kommunale Selbstverwaltung*) based on a general assumption of local authorities' responsibility for all local matters, within the frame set by federal and Land legislation. Apart from devolving very significant regulatory powers to the *Länder* and leaving them responsible for the implementation of most federal legislation, the Constitution also endows the *Bundesrat* – representing the *Länder* governments – with the right to veto much of the *Bundestag's* legislation. Overall, the independence of well empowered *Länder* promotes strong diversity in *Land* practices and reforms, and at the same time a highly consensus-driven federal policy process.

The "legal state" tradition is another defining element of regulatory governance in Germany. The regulatory process and framework is characterised by *Rechtsstaat*-primacies such as elaborate legal regulations, rule-of-law, and a bureaucracy model based on a *Weberian* hierarchy of narrowly defined responsibilities and controls. The qualities of this model and the capacities to adapt it have earned Germany's public administration much recognition in terms of reliability, legality and honesty.

Regulatory management and reform at the federal level has traditionally been synonymous with and driven by efforts to de-bureaucratise and reduce administrative burdens imposed on business, especially addressing concerns of small enterprises. Many regulatory reform initiatives remain an integrated part of governments' successive *Mittelstandspolitik*. Public sector modernisation processes and innovative reforms often come from the lower levels of government, pushing through the *Länder* to the federal level.

Reform has been marked more by disjointed incrementalism than by fundamental change, and more by improvement of the existing system rather than the transposition from other systems.[1] The absence of one central single powerful actor and the multitude of reform levels and independent actors at the federal, the *Länder* and the local levels shape this process. In this perspective, the German Unification in 1990 is a case in point. Rather than re-modelling the new *Länder's* governance structures from scratch, the public sector and regulatory management systems of the five East German states were to a large extent copied from West German "twin-states", *cf.* Box 6.

As a consequence of the absence of any significant economic crises prior to the early 1990s there was no "sense of urgency", which could have been instrumental in gathering political constituencies and momentum for significant reforms of the regulatory management system. The reunification process' significant absorption not only of economic resources but also of political attention and innovation may be an additional explanation for why successive governments opted only for continued marginal reforms of the existing regulatory management system, rather than a sweeping overhaul.

Germany is the world's third largest economy after the US and Japan. With the integration of Eastern Germany it has enhanced its position as the largest market in the EU with a GDP of EUR 2 071.2 billion in 2001 and a population of 82.3 million people. The economic relevance of publicly-owned industrial assets relative to the size of the economy is relatively low compared to other OECD countries. State-owned enterprises in West Germany accounted for only 3.9% of industrial turnover in 1978, as compared to 24.9% in France.[2] Postal services, telecoms and rail were corporatised in the 1990s with a subsequent set-up of independent regulatory agencies within the portfolio of the responsible minister (*cf.* Section 3.4.) The German Government still holds 31% in Deutsche Telekom, 50% of Deutsche Post (and controls another 12% via its ownership of KfW); 50% in Deutsche Post (and additionally 18% in KfW). Its government policy is to sell off all federal shares in these two companies. The federal government holds 100% in Deutsche Bahn and aims at a partial privatisation. All tiers of government have followed a relatively pragmatic and cautious approach towards privatisation (apart from the 1990-1994 massive selling of former East German state assets via the German Trustee Agency *Treuhandanstalt*). EU measures have been important drivers behind structural reforms in key sectors such as electricity, gas, telecoms and rail, not least by accelerating, transforming and leading the German debate. However technological innovation, internal market dynamics and financial problems in the former state monopolies also played important roles.[3]

There is no serious challenge to the *Rechtsstaat* and the basic functioning of the rule-making system: administrative action is based on elaborate legislation and codes, and public sector reforms remain firmly based on the *Weberian* administrative model of steep hierarchies with narrowly defined administrative responsibilities. However German variants of New Public Management have had influence on the public sector modernisation discourse and reforms, primarily at *Land* and local government levels.[4] Adapted to the German context by the Joint Agency of Governments for Simplification of Administration (KGSt)[5] as the "New Steering Model" (*Neues Steuerungsmodell)*, private sector management principles were introduced in the 1990s to support ideas of clear-cut separation of responsibilities between politics and administration, a system of contract management, integrated departmental structures and an emphasis on output control. Available empirical data indicate that the implementation of the New Steering Model has encountered serious difficulties and obstacles, and that the early reform enthusiasm is over.[6] However local government administrations have changed under its impact "by giving cost-efficiency and economic thinking an organisational, personal and cognitive footing."[7]

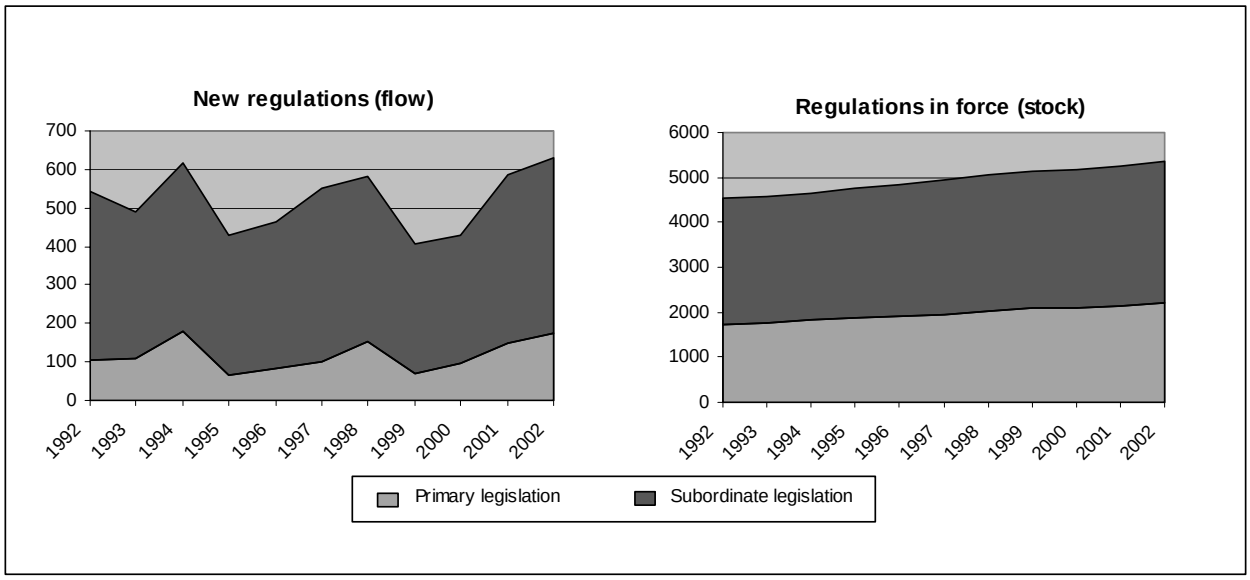
The perspective of the state as a provider of services also remains predominant in Germany. However new concepts of the *Lean State* (1995) and the *Enabling State* (1999) indicate an emerging shift of the state's role towards facilitator rather than direct provider. Furthermore, the proposals launched in the most recent government policy programme, Agenda 2010, reflect how the model of the *social market economy* is in a process of adaptation to pressures of changing international business conditions, unwinding of interlocking shareholdings, rigidities of the labour market, slow economic growth and the costs of integrating the East and West German economies.[8]

Reunification being an important contributing factor, Germany has experienced continued slow economic growth and rising unemployment for nearly a decade. Over the last few years the German government has launched a wave of reforms aiming a revitalising the economy, *cf.* Section 1 of this report. Further reforms and implementation of already announced reforms will follow. Regulatory governance –

the regulatory framework and decision-making system – plays a fundamental role by structuring and informing such policy choices. The above-mentioned fundamentals of German regulatory governance are important assets to maintain a consensus-driven, rule-based, and effective regulatory framework. However if not balanced and supported by other principles, these strengths may also pose challenges for regulatory quality and efficiency, and thereby hampering the fundamental contribution of regulatory governance to ensure coherent and evidence-based assessments of administrative, social and economic regulation. Regulatory governance in Germany is confronted with the following, inter-related challenges:

First, Germany's *regulatory system is complex*, characterised by an increasing number of federal regulations, *cf.* Figure 1 below, often expressed in complex legal terms, and with a regulatory "reality" that varies from *Land* to *Land*, either due to specific *Land* regulations or different implementation of federal regulation. Decentralisation and devolution imply important challenges to ensure consistent regulatory policies among federal, *Land* and local levels.

Figure 1. **Regulatory activity in Germany**




Note: Yearly increases in the number of regulations in force do not necessarily correspond to the number of new regulations; new regulations include revisions and repeals of exiting regulations. Regulations in force counted as of 1 July for each respective year.
*Source*: The Government of Germany.

Second, Germany has launched a series of important regulatory policy initiatives, but there is a significant *implementation gap* between available innovative tools and concepts on the one hand, and regulatory practices on the other. Long-lasting and on-going efforts to improve regulatory quality focus primarily on administrative burdens and internal reorganisation of the federal administration. Experience from OECD countries show that a comprehensive government-wide regulatory policy can promote consistent and coherent implementation of existing regulatory principles, as well as the development of new policy elements.

Third, while preserving and guaranteeing important values and quality dimensions, the *Rechtsstaat* tradition has generated a *legalistic administrative culture*, which, largely run by law-trained higher civil servants, is less receptive to a regulatory management and a reform framework based on economic criteria. Furthermore, the reliance on academia and external input to conceptualise and improve the regulatory framework has not been supportive to the development of core competencies of regulatory management skills within the administration.

Fourth, and closely related to the above issues is the limited use of *evaluations and quantitative, evidence-based assessments* as the basis for regulatory decision-making. The high political focus and numerous projects devoted to reducing administrative burdens over the last two decades is a case in point. Despite the abundant number of administrative simplification initiatives there have been no attempts to evaluate past reforms systematically, to monitor the costs of the administrative burdens imposed on business and citizens, or to set out specific targets for a reduction in these burdens.

Fifth, the *Weberian* tradition of steep hierarchies of narrowly defined administrative responsibilities has fostered specialised administrative competencies in many areas, but it also feeds sectoralised approaches. Important *transparency and accessibility* issues arise from the fact that there are no government-wide obligations on ministers or a framework in place on how to conduct public consultations or communicate regulatory decisions. Stakeholders not selected as consultation partners or familiar with the workings of the regulatory process may therefore be in a systematically disadvantageous position. In the same vein, while Germany's strong legal tradition provides business and citizens with a strong, formal claimant position, this may also be a factor weakening individuals' participatory role in the policy-making process by establishing high "participatory threshold costs".

Finally, some stakeholders are concerned that constitutional and traditional precedents favouring a strongly consensus-driven decision-making process are coming at an increasingly high price by enabling many players at different levels and with different legitimacy to block or significantly stall the regulatory decision-making process. This issue has been the subject of much debate in political, academic and, increasingly, popular circles. The debate focuses on disabling vested interests from blocking reforms as well as ways to clarify federal-*Land* relations with a view to improving the effectiveness and efficiency of the political decision-making system while at the same time safeguarding constitutional fundamentals.

Recent years have seen an increasing – but yet far from dominant – appreciation at political and administrative levels of the need to broaden the scope and depth of regulatory policies and of the potential benefits this may offer in terms of better, more cost-efficient regulation. Many of the issues and challenges listed above are already being addressed, either as part of specific government-sponsored projects or as pointers for further work set out in government policy programmes. Recent initiatives such as the new requirements and guidelines to prepare regulatory impact analysis (RIA), and the Federal Government *Initiative to Reduce Bureaucracy* bear witness to this (*cf.* Section 1.2), and offer a sound basis for additionally needed reforms to Germany's capacities for high quality regulations.

### *1.2. Recent regulatory reform initiatives to improve public sector capacities*

Curbing bureaucracy and reviewing existing regulations have been by far the most prominent aspects of regulatory quality in past political programmes. This remains the case, although more weight is now given to *ex ante* measures to assure regulatory quality.

Two public sector reform programmes launched in the 1990s have been the pivotal points for recent initiatives to improve public sector capacities for high quality regulation. The *Lean State* programme was initiated as part of the 1995 government coalition agreement. Its objective was to reduce the amount of tasks performed by the state and to augment efforts to reduce "bureaucracy". In October 1997 an independent Advisory Council appointed by the government and composed of experts from political and academic circles, trade unions, and *Länder* and local authority representatives tabled a set of proposals to the federal chancellor. Public sector modernisation, debureacratisation and deregulation constituted key elements of the proposals. A government steering committee was established in late 1997 to promote the implementation of measures recommended by the advisory council. Important measures implemented prior to the change of government in September 1998 included new government procedure requirements obligating regulators to carry out a quality checklist-based review of draft bills, and the adoption of the Act to Expedite Planning and Approval Procedures. Several other proposals put forward by the advisory council were not implemented, but they remain pertinent issues on the regulatory governance agenda in Germany.[9]

The *Modern State – Modern Administration* programme launched in 1999 has as its overall objective to introduce and promote a new conception of the state as "the enabling state", *cf.* Box 1. Improved regulatory efficiency and quality is identified as a key component of these efforts. The programme has launched a series of projects intended to support public sector modernisation and regulatory capacities, including the introduction of accrual accounting, efforts to reform the civil service system, and reviews of existing regulations.

The programme argues that the concept of the lean state pursued in the past was limited to reducing public tasks; there is a need to go beyond isolated approaches of internal modernisation in order to strengthen society's potential for self-regulation. At the same time, the federal government should remain responsible for the legal framework, ensure regulatory quality and an improved co-ordination between the levels of government. The rationales for reform set out in the Modern State programme reflect considerations behind similar reforms in other OECD countries. Regulatory reform as a policy has changed from one focussing primarily on deregulation to one that views regulation and regulatory management as part of a broader governance agenda.

Box 1. **The " Modern State – Modern Administration" programme**

The 1999 federal Government reform programme *Modern State – Modern Administration* has as its overall objective to introduce and promote a new conception of the state as "the enabling state." At the core of this concept is the ambition of a more restricted role of the state, encouraging self-regulation and private initiative, while at the same time continuing "to have the duty to protect the freedom and security of its citizens as its core task for which it remains solely responsible…"

The programme sets out four principles and four reform areas, to be carried forward by a number of specific projects:

- *A new distribution of responsibility*, promoting the devolution of social responsibility and strengthening society's potential for self-regulation;
- *Responsive public services*, stressing values such as participation, transparency of government activities, accessibility, communication;
- *Diversity of public bodies*, encouraging better co-operation between the different tiers of administration, diversity within the federation and more weight to the principle of subsidiarity;
- *Efficient administration*, calling for efficiency and effectiveness in the public sector, use of competition, benchmarking and performance-based remuneration, and reduction of administrative burdens.

The programme identifies four key areas of reform:

- Enhanced effectiveness and acceptance of legislation;
- Improved co-operation between the levels of government and with the private sector;
- A competitive, cost-efficient and transparent administrative system;
- Highly-motivated employees.

Key projects supporting regulatory quality management include:

- Preparation of RIA manuals (finalised in 2001; however a revision of guidelines is being considered, *cf.* Section 2.1.);
- Review of the Administrative Procedure Act providing the legal basis for online access to governmental services using qualified electronic signatures;
- Publication of a report of 80 suggestions from business to reduce administrative burdens and how to implement these suggestions;
- Preparation of Freedom of Information Act (not yet proposed to Parliament).

The most recent government programme *Agenda 2010* launched in the spring of 2003 includes confirmations of a strong political commitment to public sector reforms and the reduction of administrative burdens.

As part of the *Agenda 2010* programme on SME policies, the government brings together the on-going projects to reduce bureaucracy under the July 2003 *"Initiative to Reduce Bureaucracy"*, see also Section 4.2. In future stages of the initiative, the German Government intends to set up and monitor the implementation of quantitative targets for each of the 54 burden reduction projects selected to be part of the initiative.

Although launched by different governments, past programmes to improve public sector capacities and reduce bureaucracy show a high degree of continuation, both in terms of focus and in terms of carrying over specific projects.

Box 2. **Milestones in improving regulatory capacities in Germany**

| Year | Act/ordinance/guidance/programme |
|---|---|
| 1958 | *Joint Rules of Procedure* of the Federal Ministries. Revisions in 2000 introduce obligations to prepare regulatory impacts analysis |
| 1977 | Administrative Procedure Act |
| 1984 | The *Blue Test Question* on regulatory quality issues endorsed by Cabinet |
| 1996 | Act to Expedite Approval Procedures |
| 1991 | Manual on Legal Drafting endorsed by Cabinet |
| 1992 | Establishment in all federal ministries of units dedicated to co-ordinate and transpose EU legislation |
| 1997 | Established in 1995, the independent Lean State Advisory Councils tables its final report to the federal chancellor |
| 1999 | Government programme *Modern State – Modern Administration* introduces the enabling state |
| 1999 | Establishment of a "debureacratisation" unit in the Ministry of Economics and Labour |
| 2001 | RIA guideline issued by the Ministry of the Interior |
| 2003 | Agenda 2010 |
| 2003 | The Initiative to Reduce Administrative Burdens |

## 2. DRIVERS OF REGULATORY REFORM: NATIONAL POLICIES AND INSTITUTIONS

### *2.1. Regulatory reform policies and core principles*

The 1997 *OECD Report on Regulatory Reform* recommends that countries adopt at the political level broad programmes of regulatory reform that establish principles of "good regulation" and clear objectives and frameworks for their implementation. The 1995 *OECD Council Recommendation on Improving the Quality of Government Regulation* contains a set of best practice principles against which reform policies can be assessed. Recent reforms demonstrate a high level of consistency with many of these recommendations, however implementation and enforcement across the government will require sustained efforts and capacity building.

A regulatory policy is an explicit policy that aims to continuously improve the quality of the regulatory environment, among others by providing an integrated approach to the use of regulatory tools, procedures and institutions. Experience in OECD countries suggests that an effective regulatory policy has three basic components that are mutually reinforcing: It should be adapted at the highest political levels; contain explicit and measurable regulatory quality standards; and provide for continued regulatory management capacity.[10] In Germany, different sub-elements of such a policy exist:

- The Constitution provides the right to bring administrative decisions to court, and the 1960 Administrative Courts Code stipulates that complaints must be filed no later than one month after the decision has been published.

- A general obligation for the authorities to consult with affected parties is set out in the 1977 Administrative Procedures Act;

- The "Blue Checklist" endorsed by the Cabinet in 1984 marked an early formal concern with regulatory quality issues and introduced a broad set of issues for regulators to consider when preparing new federal legislation.[11] The checklist has many similarities with the 1995 Checklist for Regulatory Quality endorsed by OECD Member Countries more than 10 years later;

- The *Joint Rules of Procedure for Federal Ministries* (first published in 1958) establishes in detailed form steps to prepare, co-ordinate and present policy proposals for Cabinet. Chapter 6 specifies requirements for the entirety of the regulatory process, including consultation (within and outside government), structure of bills, justification statements, legal scrutiny, procedures for submission of bills to cabinet and parliament, promulgation, etc. Following revisions in 1996 and 2001, the obligations of ministries to prepare and scrutinise draft regulations were strengthened, among others by requiring all draft regulations to be accompanied by regulatory impact analysis (RIA). The Blue Checklist Questions were integrated into the *Joint Rules* as part of these revisions. The *Joint Rules* has the status of internal government instructions (*Verwaltungsvorschriften).* The *Joint Rules* does not prescribe any particular format or approach of the impact analysis, nor does it prescribe sanctions for non-compliance;

- A non-mandatory guidance from July 2000 prepared by academics for the Ministry of the Interior explains what RIA and its basic principles are, and suggests possible analytical approaches on how to conduct RIAs. In its current version, there are no clear criteria or guidelines in place for when to prepare RIAs, nor on the appropriate level of analysis (see also Section 3.3.).

- The 1991 *Manual on Legal Drafting* (revised in 1999) prepared by the Ministry of Justice provides guidance on formal requirements of the legal system with regard to linguistic terms, structure and format to be used in new laws and regulations. The 1992 *Guidelines for Drafting Legal Provisions and Administrative Regulations* prepared by the Ministry of the Interior has a similar focus on technical and legal considerations in the preparation of new regulation.

There is currently no guidance available for regulators on how to assess regulatory impacts on business or SMEs, or on how to calculate administrative burdens. The Ministry of the Interior has announced that it will prepare supplementary and more operational RIA guide. The guideline is currently expected to be available before September 2006 (end of the legislation period). Furthermore, the Ministry of Economics and Labour in 2003 commissioned work on methodologies to improve the analysis of regulatory impacts on business. This report will be published in spring 2005.

Box 3. **Good practices for improving the capacities of national administration to assure high quality regulation**

The OECD Report on Regulatory Reform, welcomed by Ministers in May 1997, includes a co-ordinated set of strategies for improving regulatory quality, many of which were based on the 1995 Recommendation of the OECD Council on Improving the Quality of Government Regulation. These form the basis of the analysis undertaken in this report, and are reproduced below:

**A. BUILDING A REGULATORY MANAGEMENT SYSTEM**

1. Adopt regulatory reform policy at the highest political levels

2. Establish explicit standards for regulatory quality and principles of regulatory decision-making

3. Build regulatory management capacities

**B. IMPROVING THE QUALITY OF NEW REGULATIONS**

1. Regulatory Impact Analysis

2. Systematic public consultation procedures with affected interests

3. Using alternatives to regulation

4. Improving regulatory co-ordination

**C. UPGRADING THE QUALITY OF EXISTING REGULATIONS**

*(In addition to the strategies listed above)*

1. Reviewing and updating existing regulations

2. Reducing red tape and government formalities

German principles for good regulation include significant considerations of legal quality, de-bureaucratisation possibilities – particularly affecting SMEs – and a strong strive towards consensus. However principles of quantitative assessments and cost-benefit tests are not yet equally endorsed and – more importantly – *applied* as guiding principles for regulatory quality.

### *2.2. Mechanisms to promote regulatory reform within the public administration*

Mechanisms for managing and tracking reform inside the administration are needed to keep reform on schedule and to avoid a recurrence of over-regulation. It is often difficult for ministries to reform themselves, given countervailing pressures, and maintaining consistency and systematic approaches across the entire administration is necessary if reform is to be broad-based. This requires the allocation of specific responsibilities and powers to ministries at the centre of government. The German government has established several central regulatory co-ordination and management units, supported by ministries with horizontal responsibilities. These units could form the core of a potentially effective regulatory management system. This would require them to work more closely together, clarify their respective roles, develop analytical expertise, and implement a broader array of regulatory quality standards.

Box 4. **The legislative process in Germany**

The procedure for preparing legislation is set out in the Join Rules of Procedure of the Federal Ministries, the Rules of Procedure of the German Bundestag, and the Constitution. The procedure includes the following main elements:

*1. Initialisation.* The legislative procedure in Germany is usually initiated by the ministry responsible for the concerned policy area or prompted by bilateral discussions with the Chancellors Office. The proponent (lead) ministry notifies the Federal Chancellery about the intention to prepare a specific law. For secondary legislation the proponent Minister normally acts under the statutory delegation stated in the relevant acts of Parliament. In such cases the proponent ministry may not notify the intention to act.

*2. Pre-consultation and preparation of draft measures*. The preparation of draft measures often involves very early soundings from affected, organised interests and academics, and the involvement of *Länder* and local authorities. Depending on the complexity of the subject matter, ministries often draw extensively on preparatory work and analysis carried out by scientific advisory committees and commissions.

*3. Internal co-ordination.* The lead ministry is responsible for ensuring that other ministries with an interest are consulted at an appropriate stage and that the necessary collective agreement is obtained. The duration of the internal consultation process is left to the discretion of the lead ministry. The Ministry of Justice (constitutionality and legal quality) and the Ministry of the Interior (compliance with requirements set out in the *Joint Rules of Procedure*) must be consulted on all draft regulations. Draft bills circulated for internal consultation may be accompanied by an explanatory memorandum, sometimes including assessments of economic and other impacts of the draft regulation. In the infrequent cases where agreements on the quality – as well as other aspects – of draft regulations cannot be reached at the administrative level, the lead ministry must inform the Cabinet about dissenting opinions in its submission letter to the Cabinet.

*4. External consultation.* Timing, scope and selection of consultation partners is left to the discretion of the lead ministry, as is the practical execution of the consultation process. Internet-based notice-and-comment procedures are applied infrequently. Draft bills for external consultation may be accompanied by an explanatory memorandum, which, however, rarely includes a RIA.

*5. Cabinet decision.* The cover letter to the draft bill presented to the Government must state, among others, whether the Ministry of Justice has confirmed its technical scrutiny of the bill. It must also state dissenting opinions from other government departments, and the expected budgetary costs to the Federation, the *Länder* and the local authorities, as well as listing alternative means by which the regulatory objective could be reached.

*6. Parliamentary reading.* The Constitution allows for a first passage in the Bundesrat (Parliament higher chamber), which provides for the Bundesrat to make initial comments on the draft law even before it is submitted to Parliament. The following transmission of the bill to the Bundestag (Parliament lower chamber) must include an explanatory memorandum (including a RIA), comments from the Bundesrat and counterstatements by the Government. In the Bundestag, bills are referred to one or more committees. The committees can call upon government officials, ministers and experts to participate in its meetings, which are occasionally open to the public. The committees may hold public hearings of experts and representatives from interested parties. The lead committee prepares a report with recommendations to the plenary of the Bundestag, leading to changes in more than half of the bills.[12]

*7. Involvement of the Bundesrat and the Mediation Committee*. Every draft 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. A Mediation Committee composed of members of the two chambers is charged with negotiating and suggesting compromises in cases where the Bundesrat does not consent to a draft bill.[13]

*8. Signing and promulgation.* When signed by the appropriate minister, the Chancellor and the President, the law is forwarded to the Federal Law Gazette for promulgation. Regulations become legally binding and normally come into force by the time of their publication in the Federal Law Gazette.

As in all OECD countries the individual federal ministries in Germany are primary responsible for initiating and developing regulatory proposals within their areas of responsibility, as well as for consulting with affected parties and assuring regulatory quality control. Ministries enjoy a high degree of autonomy in initiating, developing and implementing regulations within their respective areas. The *Joint Rules of Procedure* sets out the formal obligations for when and how lead ministries involve other ministries and stakeholders affected by new regulation. Box 4 below summarises the legislative process in Germany.

The following ministries, units and committees have roles in promoting regulatory quality across the whole of government:

*The Ministry of the Interior* must be consulted in the preparation of all laws and subordinate regulations. It plays a key role in the regulatory process through its responsibility to scrutinise all draft legislation in terms of compliance with the *Joint Rules of Procedure*, in particular the obligation to prepare regulatory impact analysis. A staff of four persons is allocated to the *Normkontrolle* of approximately 400-500 regulations per year. The Ministry of the Interior has no formal powers to block proposals for regulation if they do not reach expected quality standards. The Ministry of the Interior also acts as the secretariat for the Committee of Permanent Secretaries responsible for implementing the "Modern State – Modern Administration" programme.

*The Ministry of Economics and Labour* 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. The Ministry of Economics and Labour also set up a project group in 1999 to reduce administrative burdens on SMEs (*Abbau bürokratischer Hemmnisse*). The group has been transformed into a permanent office (*Referat*).

*The Ministry of Justice* has a general responsibility to ensure technical legislative quality as well as the constitutionality of new legislation. The Ministry of Justice must be consulted on all draft legislation. When bills are submitted to the Federal Government for adoption, a cover letter must state, among other things, whether the Ministry of Justice has examined it in accordance with principles of legal scrutiny, and whether formal drafting and structural requirements have been met.

*The Chancellery* has no strong role in the day-to-day regulatory process, but desk officers shadowing regulatory and other policy proposals from the individual ministries seek to ensure that differences between ministries are speedily resolved and that proposals for new legislation are in line with the overall policy agenda. The Chancellery operates an information system for the planning of federal projects and legislation. The system contains information about content, objectives, necessity, timetable, budgetary impacts, parliamentary proceedings etc. The data-base is accessible to all government departments. It is not made publicly available. Federal ministries are obliged to notify the Chancellery of all projects for the ensuing 12 weeks which are of relevance to the cabinet and require cabinet decisions. Departments are provided a weekly updated overview of these notifications.

The *Ministry of Finance* assesses the effects on public expenditure and revenues.

*Ad hoc Committees of Permanent Secretaries* have been charged with implementing recent public sector reforms and initiatives to reduce administrative burdens. In 1999, a committee was set up under the aegis of the Federal Minister of the Interior to implement the "Modern State – Modern Administration" programme. The committee was charged with promoting an "enhanced effectiveness and acceptance of legislation". The committee, reporting annually to the Cabinet, was not involved in the day-to-day regulatory process, or in the overall management of the legislative agenda. It was dissolved on 15 January 2003. On 26 February 2003 another Committee of Permanent Secretaries was set up, also under the aegis of the Federal Minister of the Interior, to develop and implement the "Initiative to Reduce Bureaucracy".

Though several Ministries carry out government-wide activities to improve regulatory quality, in contrast to other OECD countries, there is no permanent centralised unit in place, *cf.* Box 5. Instead, committees and working groups with specific reform tasks have been set up with the capacity to review and support regulatory reform across the ministries.

Box 5. **Central regulatory quality units: OECD experience**

Experience across the OECD suggests that central oversight units are most effective if they are:

- Independent from regulators (*i.e.* they are not closely tied to specific regulatory missions);
- Operate in accordance with a clear regulatory policy, endorsed at the political level;
- Operate horizontally (*i.e.* they cut across government);
- Staffed by experts (*i.e.* they have the information and capacity to exercise independent judgement); and
- Linked to existing centres of administrative and budgetary authority (centres of government, finance ministries).

Central oversight units can carry out three different roles. First, bodies may be *advisory*, *i.e.* increasing regulatory capacities by publicising and disseminating guidance and by providing support to regulators. The second role, *advocacy*, refers to the promotion of long-term regulatory policy considerations, including policy change, development of new and improved tools and institutional change. Third, bodies promoting regulatory quality may have a *challenge* function *vis-à-vis* new regulatory proposals. Such challenge may be in the form of an assessment putting pressure on the proponent regulatory body to improve performance in accordance with a set of given criteria. Or it may in the form of a "veto", where the reviewing body acts as a gate-keeper in the regulatory process.

Experience suggests that most regulatory policies have relied primarily on advocacy and advice. Advisory and advocacy functions are helpful preconditions for creating a fruitful and non-confrontational environment for regulatory quality. However, leadership in the form of regulatory oversight bodies challenging as well as setting and enforcing targets for regulatory quality may be needed to go beyond the limits of reforms that are primarily driven by self-assessment.

### *2.3. Co-ordination between levels of government*

Regulatory systems are composed of complex layers of regulation stemming from sub-national, national, and international levels of government. Complex and multi-layered regulatory systems have long been a subject of concern with respect to the efficiency of national economies and the effectiveness of government action. High quality regulation at one level can be undermined or reversed by poor regulatory policies and practices at other levels, while, conversely, co-ordination can vastly expand the benefits of reform. In Germany, sub-national and supranational levels are inextricable elements of the regulatory framework, and developments at one level affect developments at the others. This section looks at the

policies and mechanisms for co-ordinating regulations between the *Länder* and municipalities on the one hand, and the European level on the other. Annex 1 provides an overview of the division of main regulatory powers between levels of government in Germany.

### *2.3.1. Federal – Land level*

The Federal Republic of Germany was established under the 1949 Constitution as a two-layer federal system consisting of the federal and *Länder* levels, with the municipalities as constituent parts of the *Länder*. The *Länder* therefore set important parameters for the operation of local governments.

However within their local autonomy, the municipalities and counties traditionally carry out a wide range of local service delivery, including social assistance, local land-use and physical planning and infrastructure provisions. In conformity with a constitutional tradition dating back to the early nineteenth century, the municipalities and the counties have the right to decide all matters of local community in their own responsibility within the framework of the existing law. The functional (though not regulatory) importance of local governments in Germany is significant compared to most other OECD countries. Local governments implement more than 75% of federal and *Länder* legislation and handle two-thirds of public capital expenditures.[14]

The Constitution provides the *Länder* with strong independence as well as regulatory powers and responsibilities. The *Länder* have exclusive or almost exclusive regulatory powers in areas such as education, health, and security. Some responsibilities are also shared between the federal government and the *Länder, cf.* Annex 1.

The *Länder* are responsible for implementing most federal regulations as a matter *of their own concern* under their own responsibility. The *Länder* only perform as *agents* of the Federation when implementing specific federal statutes referred to in the Constitution. Since the implementation of regulations is delegated to the *Länder*, there is generally no federal representation at the *Land* level.

The "accession" in 1990 of the five new East Germany *Länder* provided the opportunity to establish a new regulatory system for these *Länder*, drawing on and adapting experience from West Germany and other countries. However, as described in Box 6, institution-building in the East German *Länder* resulted by and large in a full transfer of the existing West German system.

Box 6. **Transformation by transfer: Institution-building in East Germany**

The fall of the Berlin wall in November 1989 also led to a breakdown of the German Democratic Republic's administrative and regulatory system. The need to rebuild the regulatory framework offered, in principle, the opportunity to establish a new regulatory system drawing on positive and negative experiences from West Germany and other countries, and to adapt these experiences to the specific needs and challenges facing the five new *Länder* of the federation.

The profound changes of reorganising and rebuilding the political and administrative structure took off in May 1990 after the first democratic elections of local governments. A wave of bills adopted in the spring of 1990 by the *Volkskammer*, the GDR Parliament, prepared the adaptation of major legal provisions to the West German law system. In July 1990, the *Volkskammer* decided to rebuild the East German *Länder*. The formal "accession" of the German Democratic Republic (GDR) to the Federal Republic of Germany (FRG) took place on 3 October 1990 and was followed by a prompt integration of the GDR into the constitutional, political, and institutional system of the FRG.

The institution-building in the East German *Länder* ended up being mainly determined by guidelines and patterns of the West German system, often copying or varying the institutional set-up of the twinned West German *Länder*. Important reasons for this were, among others:

- Very strong political dynamics and pressures for rapid reforms and reunification;
- The Unification Treaty granted three months to the *Länder* and the federal government to determine which administrative bodies would be carried over into the new political structure. The administrative bodies that were not dissolved went through a hasty restructuring, where West German models were a logical first choice of inspiration;
- In early 1990 the provisional East German government established a commission charged with preparing and implementing administrative reforms. Its regional teams immediately started discussions with West German counterparts on the future constitutional set up and administrative system of the new *Länder*. These discussions were held between so called *Partnerländer*, Twin *Länder* (*i.e.* Brandenburg with Northrhine-Westfalia and Saxony with Bavaria.) Identical political affiliation of the respective governments was a decisive factor in twinning the Eastern and Western *Länder;*
- The integration was often personified and conveyed by West German experts, mostly civil servants, who were transferred to the new *Länder* in order to set up new administrative structures, thereby often transferring structures and routines from their previous administrative bodies;
- The enormous transfer of financial resources from the old FRG to the new *Länder*, amounting to around EUR 75 billion or 4.5% of West German GDP p.a. (and a total of EUR 800 billion in net transfers since reunification) served as a strong argument for shaping the new *Länders'* administrative body according to the West German model.

One important advantage of the massive transfer of practices, institutions and know-how to the new *Länder* was to largely avoid durable inconsistency of interpretation and implementation of national laws and regulations by the *Länder*. Furthermore, the take-over of well-tested West German systems enabled administrational bodies to be operational very quickly.

However by extending the West German system to the East, an opportunity to rethink the contemporary role of traditional West German institutions was missed, as well as the possibility to pragmatically correct and adapt flaws in the old regulatory systems.

Several formal and informal mechanisms are in place to ensure early and substantive co-ordination between the federal government and the *Länder*:

- There is a continuous informal dialogue between federal and *Land* representatives at different levels, in many different forms and on political as well as technical and professional issues;
- The *Joint Rules of Procedure* obliges ministries to involve representatives from the *Länder* and the national associations "as early as possible" in the regulatory process. The *Joint Rules* also requires that draft regulations must include estimates of impacts on *Land* and local government budgets;
- *Planning committees* are responsible for co-ordinating joint activities between the Federation. The committees have representatives from both levels: federal and *Länder* governments.

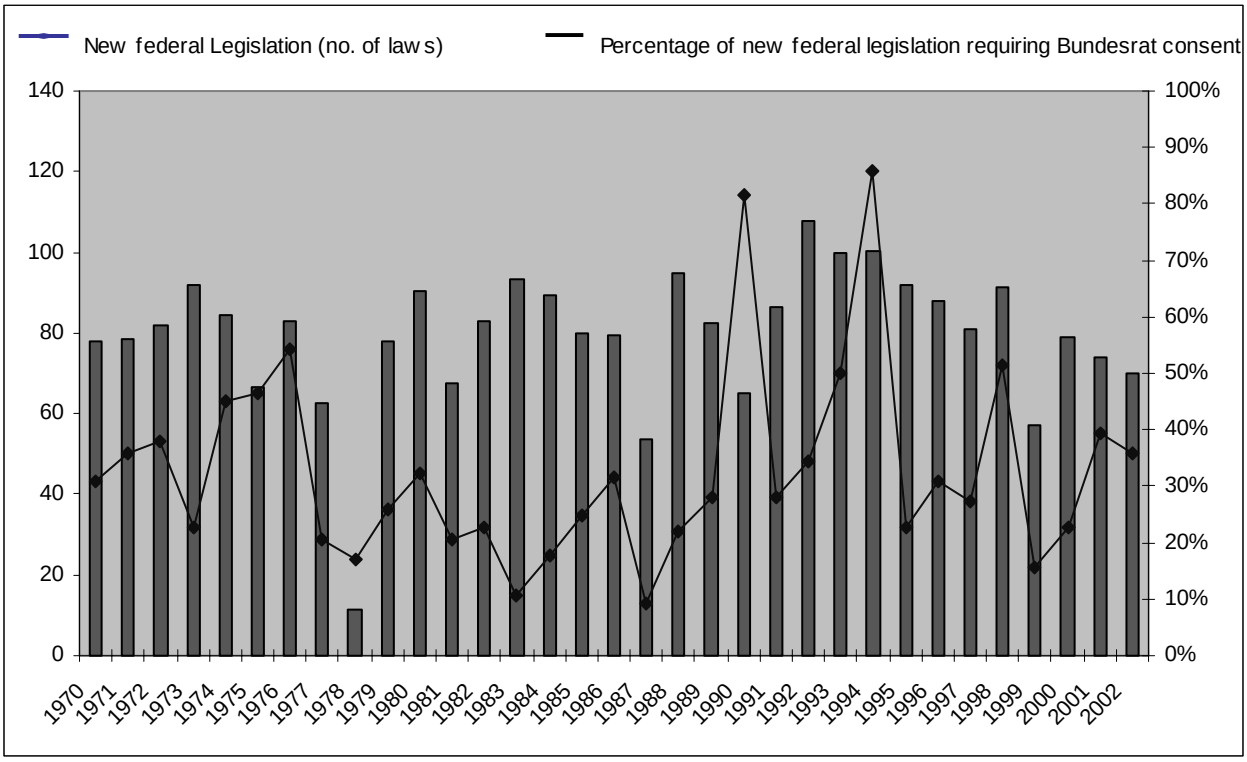
– *High-level councils* are set up to co-ordinate policies between the government tiers. The most important one is the Financial Planning Council, which makes non-binding recommendations on the co-ordination of the budgets and financial plans of the federal government, the *Länder* and municipalities. It is chaired by the Federal Minister of Finance and consists of the *Länder* Ministers of Finance, the Federal Minister of Economics, and representatives of the municipalities and the German Central Bank. It is assisted by a number of high-level experts.

– Twice a year, ministers of the Interior (federal and *Länder*), supported by permanent working groups covering all areas of *Länder* and federal authorities, meet to discuss issues of common interests, including practices for the implementation of federal regulation;

– Finally, the Constitution requires that every bill passed by the Bundestag must be submitted to the Bundesrat (representing the governments of the 16 *Länder*), either requiring the Bundesrat's consent, when it substantially affects the interests of the *Länder* (*Zustimmungsgesetze*) or providing it with the opportunity to lodge an objection (*Einspruchsgesetze*). If the Bundesrat does not consent to a draft bill, the draft is submitted to a Mediation Committee, composed of sixteen members of each of the two chambers. Meetings of the Committee are strictly confidential. The purpose of the mediation procedure is to amend the bill to both chambers' satisfaction, and to submit a compromise proposal to the Bundestag and the Bundesrat.[15]

Approximately half of all laws passed by the Bundestag require the consent of the Bundesrat, *cf.* Figure 2.[16]

Figure 2. **New federal legislation promulgated with the consent of the Bundesrat**




Note: Numbers above only include new laws, *i.e.* exclude laws amending existing legislation.
Source: Government of Germany.

There has been no significant increase over the past 30 years in the share and number of new federal laws requiring Bundesrat consent. However, many observers and stakeholders argue that there is scope for improving Parliament procedures on two mutually supportive areas relating to co-operation between the two chambers. First, by clarifying *Land* and federal competencies it may be possible – from an economic point of view, and without compromising the fundamentals of German federalism – to improve the capacity and efficiency of the political decision-making system.[17] Germany's inter-governmental fiscal relations in some areas introduce inefficient spending decisions by giving strong incentives to individual *Länder* to over-spend or over-invest in areas where they only carry a share of the total costs. It has been suggested that reforms conducive to this end could include, among others, a reform and reduction of activities co-funded by the federal government and the *Länder* and better alignment of taxation and spending competencies.[18] Such changes in the economic incentive structure of inter-governmental funding arrangements are likely to be supportive of stronger incentives for more comprehensive cost and benefit analysis of policy proposals affecting the various levels of government. Second, by ensuring that bills are supported by high quality impact assessments, Parliament may have an improved and more informed basis for their decision-making. This goes for bills presented to Parliament by the Government and, as importantly, for bills, which have undergone (significant) changes as part of Parliament's deliberations.

Box 7. **Regulatory quality assurance mechanism in the parliamentary process**

There are indications of an increasing inconsistency in some OECD countries between the regulatory quality assurance mechanisms available to the executive and parliaments. On the executive side, numerous procedures, tools and institutions are often applied to assure that regulations are designed in accordance with specific regulatory quality standards. On the legislative side, resources and procedures are not always in place to support assessments of proposed amendments to legislation in terms of their economic impacts and regulatory quality. In cases where bills tabled by governments are not accompanied by clear and high-quality impact assessments, among others presenting alternative regulatory measures and their costs and benefits, the basis for Parliaments deliberations are worsened. Therefore, there is a risk that the policy objectives guiding parliament's amendments are not realised or realised at a cost – had high-quality RIAs been made available to Parliament as part of their deliberations – that would have rendered the amendments politically unfeasible.

In the case of Germany, 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 MoP 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 with expert opinions on various aspects of the proposed regulation.

However, studies of regulatory impacts, alternatives and their costs and benefits are time consuming and require expertise. 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.[19] An important reason for this 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.

The *Länder* are relatively advanced in their considerations to institutionalise parliaments' assessments of the impacts and quality of draft bills. 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.[20] A number of *Länder* also considered to formalise RIA and other regulatory assurance mechanisms in the respective *Länder* constitutions.

In Rheinland-Palatia, early considerations included creating a specific body charged with carrying out assessments for the Parliament of the quality of bills.[21] 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-Pfalz 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.

In both areas, considerations are under way addressing these challenges, although not yet matched by concrete results. First, with a view to establish a possibly clearer separation of federal and *Land* competencies, there seems to be a growing political consensus to establish a commission to look into the possibilities to reform the constitution.[22] Second, as for mechanisms to ensure that parliament deliberations are supported by more evidence-based assessments, there also seems to be an increase in awareness and activities, especially at the *Land* level, *cf.* Box 7.

*Assessment*. The constitutionally prescribed and very significant devolution and decentralisation to the *Land* and local levels provides a very distinctive German framework to ensure a coherent, yet flexible regulatory framework. Devolution and decentralisation pursued in many OECD countries as a way to improve efficiency and greater responsiveness to citizens are not policy options, but to a large extent pre-defined conditions for pursuing these goals. The existing degree of independence of local and Land levels implies an important challenge to ensure consistent regulatory policies among federal, land and local levels. Mechanisms to ensure early and intensive co-ordination with lower levels of government appear comprehensive and well-developed. The on-going and emerging considerations to enhance the efficiency and quality of regulatory impact analysis available for these procedures point to the scope for further improvement in this area.

### *2.3.2. National – European level*

As in other members of the European Union, EU legislation accounts for more than half of all new regulation. In Germany, it is roughly estimated that at least 60% of all primary and secondary legislation originates from the EU.[23] Ensuring high quality and timely implementation of these regulations is therefore important for a good regulatory framework.

In transposing European Directives into German law, Government procedures require a broadly similar process of consultation and impact assessments as for regulations introduced on a domestic initiative. The *Joint rules of procedure for federal ministries* sets out procedural requirements, including obligations for informing and involving the *Bundestag.* The lead ministry is responsible for assessing expected impacts of the proposal on the budget and to take into account the expected enforcement impacts. Co-operation with the *Länder* is set out in a 1993 agreement (revised in 1998) stipulating information and consultation procedures with the *Bundesrat.*

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.[24] Available information indicates that German assessments of EU legislations is characterised by the same strengths and weaknesses as national regulation. Priority and resources are attached to ensuring consultation with the *Länder,* business and labour organisations, and to assure the constitutionality of the new measures. However early and systematic efforts to quantify costs by means of cost-benefit tests or other methodologies receive less attention.

As other EU States, Germany systematically attempts to influence 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 favourable in the German context, *i.e*. the option to choose *negotiated access* as a means to liberalise gas and electricity markets.

## 3. ADMINISTRATIVE CAPACITIES FOR MAKING NEW REGULATIONS

This section reviews how current processes for making legislation and subordinate-regulations support applications of core principles for good regulation. It describes and evaluates systemic capacities to generate high quality regulation, and to ensure that both processes and decisions are transparent to the regulated public.

### *3.1. Administrative transparency and predictability*

Transparency of the regulatory system is essential to establishing a stable and accessible regulatory environment that promotes competition, trade, and investment, and helps insure against undue influence by special interests. Transparency reinforces the legitimacy and fairness of regulatory processes. A multi-faceted concept that is not easy to achieve in practice, transparency involves a wide range of practices, including standardised processes for making and changing regulations; consultation with interested parties; plain language in drafting; publication, codification, and other ways of making rules easy to find and understand; and implementation and appeals processes that are predictable and consistent.

#### *3.1.1. Transparency of procedures: administrative procedure laws*

Transparent and consistent processes for making and implementing legislation are fundamental to ensuring confidence in the legislative process and to safeguarding opportunities to participate in the formulation of laws. In the majority of OECD countries, such procedures are established in legislation supplemented by decrees, guidelines or policy statements issued by the government or individual ministries.

Elements of general administrative procedure requirements are set out in the Constitution and in the 1977 Administrative Procedures Act. They set out general obligations for the authorities to consult with affected parties (as defined by 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 (see Section 3.1.4. below).

The framework conditions set out in the Administrative Procedures Act are in many cases modified by specific administrative procedures for particular policy areas. Thus, administrative procedures, including authorities' obligations to inform plaintiffs and applicants may vary, also between areas where citizens frequently have regulatory interactions with the authorities, *i.e.* planning, housing and establishing a business. 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.

More elaborate standardised procedures to create new regulation are set out in the *Joint Rules of Procedure of the Federal Ministries* (revised in 2000), and in guidance on RIAs, legislative technics and requirements prepared by the Ministry of the Interior and the Ministry of Justice.

Work on a Freedom of Information Act covering the Federal administration was launched as part of the Modern State – Modern Administration programme. Originally scheduled for finalisation by the end of 2001, a draft prepared in December 2000 is still subject to internal government discussions.

### *3.1.2. Transparency as dialogue with affected groups: use of public consultation*

Public consultation gives citizens and business the opportunity to have active input in regulatory decisions. A well-designed and implemented consultation programme can contribute to higher-quality regulations, identification of more effective alternatives, lower costs to business and administration, better compliance, and faster regulatory responses to changing conditions. Just as importantly, consultation can improve the credibility and legitimacy of government action, win the support of groups involved in the decision process, and increase acceptance by those affected.

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. Compared to practices in other countries with similar traditions of tripartite co-operation such as Norway and Denmark, preparation and development of major legislation in Germany has traditionally not been conducted by official, government-appointed preparatory committees responsible for preparing official reports with policy recommendations. However recent years have seen a proliferation of government appointed preparatory committees such as the Hartz Commission (labour market reform) and the Rürup Commission (health sector and pensions reforms). The increased use of commissions has been motivated by aspirations to create a faster working alternative to the traditional policy process, and to encourage more comprehensive reform proposals which – unanimously supported by commission members representing expertise, business and labour organisations – could be endorsed politically without significant modifications and delay. Recent experience to this effect are mixed. Furthermore, the transfer to such commissions of processes previously within the parliamentary realm may have transparency and accountability implications, which need to be considered carefully.

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 (*cf.* Section 2.2.). They also prescribe requirements to consult with sub-federal levels of government (*cf.* Section 2.3.). 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.

The *Joint Rules of Procedure*'s §47 calls for the involvement of central and umbrella associations and of the expert community at the federal level "as early as possible". However "the timing, scope and selection will be left to the discretion of the lead Federal Ministry, unless specific rules stipulate otherwise". Furthermore, §48 stipulates that, "if it is intended to make the bills available to the press and other bodies officially not involved […] the lead Federal Ministry […] will determine how this in done". Moreover, the decision to make a draft bill available on the Internet is subject to the decision of the lead Federal Ministry in consultation with the Chancellery and other ministries involved. These requirements apply for primary as well as subordinate legislation. The *Joint Rules of Procedure* does not prescribe minimum time limits for public consultation procedures. However allegations of inadequate, unbalanced or late consultations might provoke a hearing at the Federal Parliament.

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.[25] In general, however, there seems to be a high level of satisfaction with the current procedures among the organisations representing industry and labour.

The early start to informal consultation and the sustained participation and involvement of selected stakeholders means that interested parties can have a major influence on the final legislation. However access is not possible for parties that do not belong to organised bodies invited to participate in the consultation procedure. This can result in a *de facto* exclusion of such interests. In parallel to inviting clearly identifiable stakeholders, some OECD countries have established open notice-and-comment procedures, providing a "safety net" to ensure regulatory transparency, *cf.* Box 8.

*Forward planning.* A number of OECD countries have established mechanisms for publishing details of the regulation they plan to prepare in the future. Forward planning has proven to be useful to improve the transparency, predictability and co-ordination of regulations. It fosters the participation of interested parties as early as possible in the regulatory process and it can reduce transaction costs through giving more extended notice of forthcoming regulations.

On the basis of a coalition agreement between the governing bodies, the Federal Chancellor presents the key elements of his/her policy in a government declaration. These elements serve as an important general indication of future legislative activities. However there is no government-wide, systematic procedure for informing the public about future laws and regulations. As for the timing, scope and selection of participants in the consultation process, it is the lead federal ministry that decides if and how it wishes to announce plans for future regulation.

*Assessment.* Germany's extensive informal consultation procedures seem to be effective in communicating and consolidating views of invited stakeholders. Officials note in particular the benefits of lead ministries being able to design each consultation procedure according to assessments of what is relevant in the individual case. However the discretion left to ministries and the lack of formally defined standards for the timing, contents, process and scope of consultation procedures raise concern about the

costs, transparency and accessibility of the process for stakeholders not familiar with or frequently operating in this framework. Establishing minimum standards for consultation mechanisms, *i.e.* along the lines of several other OECD countries, *cf.* Box 8 above, seems unlikely to inflict any significant cost on the regulatory procedure, while at the same time adding benefits in terms of improved legitimacy, transparency and quality. The absence of a single Web-based access point for draft regulations (possibly categorised according to relevant themes and sectors) imposes unnecessary burdens on stakeholders not familiar with the portfolio of different government ministries. Such stakeholders may have to spend too much time searching for relevant information, while having no guarantee that the information obtained is exhaustive. The German system of forward planning is comprehensive and well developed in terms of enhancing internal co-ordination between federal ministries. However there is scope to improve the information made systematically available to the public about planned future government regulation, possibly by drawing on the information already available for the internal planning process.

Box 8. **"Notice and comment" in the United States**

The 1946 Administrative Procedure Act (APA) established a legal right for citizens to participate in rulemaking activities of the federal government on the principle of open access to all. It sets out the basic rulemaking process to be followed by all agencies of the US Government. The path from proposed to final rule affords many opportunities for participation by affected parties. At a minimum, the APA requires that in issuing a substantive rule (as distinguished from a procedural rule or statement of policy), an agency must:

*i)* Publish a notice of proposed rulemaking in the Federal Register. This notice must set forth the text or the substance of the proposed rule, the legal authority for the rulemaking proceeding, and applicable times and places for public participation. Published proposals also routinely include information on appropriate contacts within regulatory agencies.

*ii)* Provide all interested persons – nationals and non-nationals alike – an opportunity to participate in rulemaking by providing written data, views, or arguments on a proposed rule. This public comment process serves a number of purposes, including giving interested persons an opportunity to provide the agency with information that will enhance the agency's knowledge of the subject matter of the rulemaking. The public comment process also provides interested persons with the opportunity to challenge the factual assumptions on which the agency is proceeding, and to show in what respect such assumptions may be in error.

*iii)* Publish a notice of final rulemaking at least thirty days before the effective date of the rule. This notice must include a statement of the basis and purpose of the rule and respond to all substantive comments received. Exceptions to the thirty-day rule are provided for in the APA if the rule makes an exemption or relieves a restriction, or if the agency concerned makes and publishes a finding that an earlier effective date is required "for good cause". In general, however, exceptions to the APA are limited and must be justified.

The American system of notice and comment has resulted in an extremely open and accessible regulatory process at the federal level that is consistent with international good practices for transparency. The theory of this process is that it is open to all citizens, rather than being based on representative groups. This distinguishes the method from those used in more corporatist models of consultation, and also from informal methods that leave regulators considerable discretion in who to consult. Its effect is to increase the quality and legitimacy of policy by ensuring that special interests do not have undue influence.

### *3.1.3. Transparency in the implantation of regulation: communication*

In common with most OECD countries there is a basic requirement for all new federal legislation to be published in an official gazette (the *Bundesgesetzblatt*). Since 1998, downloadable and readable versions of gazette can be accessed free of charge on the Internet. The printable version of the gazette's part 1 (including, among others, all federal laws) may be obtained for a fee.

Existing legislation is made available from a number of sources. The Ministry of Justice posts consolidated versions of *important* regulations on its Internet site, free of charge. Consolidated versions of all federal primary and secondary legislation are available from the electronic database "Juris-Bundesrecht". Access to the data-base is subject to a charge. Federal ministries post on their respective homepages selected elements of legislation under their portfolio. Ministries organise this information differently – some according to themes and subjects, others alphabetically, but mostly with no or little help from search machines. In some cases, ministries attach disclaimers concerning the validity of the regulations posted on their web-site.[26]

*Plain language.* The *Joint Rules* encourages 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 the bill. In practice this facility is only rarely used. Pressure on regulators to prioritise plain language *in lieu of* legally precise terms may be somehow weakened by the fact that the majority of government officials and representatives of business and consumer associations have a legal background.

*Assessment.* In line with the law-based administrative system in Germany, citizens should have a right to an easy access to the regulations with which they are expected to comply. The selectiveness and patchiness of the information made available from different ministries' Web sites may make the information unreliable and even risky for infrequent users that do not subscribe to the consolidated database. There is scope for improving the communication of and accessibility to existing regulations in Germany by establishing a central, easily searchable, free of charge, consolidated, Internet-based database for all federal laws and regulations. Such consolidation procedures may in themselves become important drivers of further simplification, promoting a reduction of overlaps and redundancies.

### *3.1.4. Transparency in the implantation of regulation: compliance, enforcement and appeal*

Design, adoption and communication of regulation are not sufficient. To achieve its intended objective, a regulation must be implemented, applied, enforced and complied with. A mechanism to redress regulatory abuse should also be in place, not only as a democratic safeguard of a rule-based society, but also as a feedback mechanism to improve regulations.

#### *Compliance and enforcement*

Although compliance is one of the most important performance indicators of a good quality regulation,[27] the rulemaking process in Germany includes little prior assessment of legislative proposals' enforceability. This is in line with several other OECD countries, although some countries, such as the Netherlands, Canada and the United Kingdom, have launched interesting initiatives in this area.[28]

Compliance and enforcement mechanisms are marked by Germany's federal system and the division of powers and functions between the Federation and the *Länder.* In principle, administrative and enforcement functions fall to the *Länder.* The federal administration lacks, as a rule, regional and local offices of their own. The federal government has no hand in the execution of federal legislation and programmes.[29] The sometimes very prescriptive nature of federal regulations can be seen as a reflection of the limited possibilities by the federal government to influence the implementation of its regulations.

The Constitution stipulates some access to the Federal government to supervise the implementation of federal law. Where the *Länder* implement a federal law *as a matter of their own concern* (that is, when the Constitution does not explicitly assign the authority to legislate on the relevant area to the Federation), Federal supervision is restricted to verifying the legality of the enforcement.

Instructions to *Länder* to correct practices in these areas may be procedurally lengthy and burdensome.[30] When the *Länder* implement regulation *on behalf of the Federation,* the Federation's supervisory powers also include control of the expediency of law enforcement.[31] In both areas, the *Länder* are able to appeal against formal complaints or enforcement measures by the Federation via recourse to the Federal Constitutional Court.

There is no systematic monitoring of compliance levels and enforcement practices in Germany. Reasons for this may be that the *Länder*, as mentioned above, are predominantly 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. As a consequence of authority constitutionally provided to the *Länder* to implement federal regulation, implementation and enforcement mechanisms are likely to vary, as well as the applied methods and their efficiency. The actual 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 the regulatory practices between the *Länder.* To avoid greater differences in the application of food control provisions every year, a food monitoring plan is adopted by the federal parliament. Federal ministries are individually pursuing the harmonisation of implementation practices and co-operation between *Länder* via networks of permanent and *ad hoc* working groups of officials from the federal and *Länder* governments.

*Public redress and the judicial system*

A fundamental feature of regulatory justice is the existence of clear, fair and efficient procedures to appeal administrative decisions based on a regulation as well as the regulation itself. The German administrative and legal tradition is deeply imbued with the principle of judicial review, which, in turn, flows from the rule of law tradition. The Constitution's Article 19 provides all citizens with the right to recourse of all administrative decisions and actions to the courts. The first stage for seeking redress is to complain directly to the concerned authority. The Constitution provides the right to bring administrative decisions to court and the 1960 Administrative Courts Code stipulates that complaints must be filed no later than one month after the decision has been published. There is no general time limit within which the administration must make a decision on complaints over its administrative decisions. After the internal appeal has been exhausted, or if the plaintiff receives no answer within three months, 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.

Judicial reviews can be launched by way of constitutional complaint, abstract judicial reviews and concrete judicial reviews.[32] In 2002, out of 4 348 constitutional complaints bringing an application for judicial review (the total number of cases being decided was 4 715), about 2.3% were admitted. In nine cases the Federal Constitutional Court found the law reviewed was in breach of the constitution. Access to judicial review is constrained. An application for judicial review requires that the applicant is directly, presently and personally affected by the incriminated decision or regulation. A further condition is that any other judicial remedies outside the Federal Constitutional Courts have been exhausted.

At the end of 2002, the total number of pending cases with the Federal Administrative Court were 969. In 2001, the average duration of general administrative courts proceedings was 18.8 months and between 8.4 and 29.7 months for higher administrative courts proceedings.

A commission was set up in 1996 to examine and evolve proposals to reduce the Federal Constitutional Court's workload. This commission's report submitted in 1997 proposed measures to reduce constitutional right of legal redress. The report's recommendations have not been implemented, among others because the Federal Government considers the now completed reform of civil procedure as a more effective instrument to reduce the workload for the Federal Constitutional Court.[33]

### *3.2. Choice of policy instruments: regulations and alternatives*

A core administrative capacity for good regulation is the ability to choose the most efficient and effective policy tool, whether regulatory or non-regulatory. The range of policy tools and their use is expanding as experimentation occurs, learning is diffused and understanding of the potential role of markets increases. At the same time, administrators often face risks in using relatively untried tools, bureaucracies are highly conservative, and there are typically disincentives for public servants to be innovative. A clear leading role – supportive of innovation and policy learning – must be taken by reform authorities if alternatives to traditional regulation are to make serious headway into the policy system.

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 (see Box 9). 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.*

Box 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).

The need to consider regulatory alternatives also enjoys strong support in recent political programmes. Self-regulation is an integral and important component in the government's policy to create an "enabling state", which includes "strengthening society's potential for self-regulation".

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 following paragraphs describe some of the concrete experience with using alternatives to traditional regulation. As in most OECD countries, alternatives are more developed and widely used in the area of environmental protection. In implementation of environmental policies, Germany applies a range of alternatives to control-and-command regulation, including economic instruments such as user charges, deposit-refunds, and tax incentives, *cf.* Table 1 below.[34]

**Table 1. Examples of economic instruments used to promote environmental objectives**

| Instrument | | Application |
|---|---|---|
| License fees | - | Private company (DSD) charges a Green Dot licence fee for packaging waste disposal. The fee depends on volume, weight and type of packaging material |
| Deposit-refunds | - | Deposit-refunds system for beverage containers. Obligatory deposit becomes effective only if recycling level of 72% is not met. This was the case for the first time in 1997. The obligatory deposit has now been effective since the beginning of 2003 |
| User charges | - | Household waste charges defined by local administrations. |
| | - | Drinking water changes for households |
| | - | Water effluent charge for industry and waste water treatment plants |
| Compensation charges | - | Compensation charges for interference with nature (often earmarked for nature conservation). Charges defined by the *Länder*. |
| Taxes | - | Property tax exemption or reduction for land in nature conservation areas |
| | - | Value added tax reductions: local public passenger transport: reduced rate 7%; rail traffic: standard rate 16% |
| | - | Taxes on car-ownership differentiate according to vehicle type and level of pollution |
| Road pricing | - | Highway user fee for lorries over 12 tons for a fixed time period |
| | - | A distance-dependent user fee is planned to be introduced for lorries above 12 t as of August 31 2003 |

*Source*: OECD (2001a).

*Voluntary agreements* are used extensively in Germany, among others on the phase-out of environmentally harmful products. More than 100 voluntary agreements are currently in effect. German Industry's 1995 declaration on prevention of global warming is one of the country's most comprehensive and politically important voluntary environmental commitments.[35] The declaration covers over 70% of industrial final energy consumption, almost all public and industrial power generation, and a large proportion of energy suppliers providing energy to the residential and commercial sectors. Another politically very important voluntary environmental agreement was the June 2001 agreement between the Federal government and the major German power supply companies to shut down all nuclear power stations in Germany within the next 20 years.[36] The agreement provides flexibility to the industry to decide on how to allocate maximum permitted nuclear generated electricity quantities between older and younger power stations.

*Environmental management and certification.* Germany is among the countries with the highest rates of participation in EU's Eco-Management and Auditing Scheme (EMAS).[37] Evaluations show that the scheme operates well, and that with few exceptions firms and auditors comply with the rules and standards. The June 2002 revision of the EMAS scheme (EMAS II) introduced measures to benefit participating firms in terms of reduced monitoring and reporting obligations.

The status of German voluntary agreements is not well defined, many of them being non-binding commitments presented in a declaration by one or more business associations. However environmental administrations often play an important role in encouraging such agreements (by considering additional regulatory or economic instruments that might be used should an agreement not be reached, or should targets not be met) or in shaping them (by influencing the definition of targets, or insisting on monitoring and reporting). The great majority of German voluntary agreements have been effective in reaching their targets. It has been argued that their targets are generally not ambitious, as they do not go beyond the business as usual scenario. The efficiency of voluntary agreements is uncertain. Business associations face similar problems to those of governments in identifying the most cost-effective solutions and optimal allocations of reduction tasks. To ensure compliance by individual branches and firms, these associations have fewer instruments at their disposal than do government administrations. Both lack needed information on individual cost-benefit settings. Free-riding by firms covered by an agreement, which allow other firms to bear the burden of implementation, is an obvious problem.

*Self-regulation.* Germany has delegated regulatory powers to non-governmental bodies or other self-regulatory bodies, where powers are usually to be exercised within a broad policy framework laid down in a parent act. Membership of associations organising business in self-regulated sectors is required by law. Table 2 lists examples of the regulatory powers devolved to professions. The effectiveness of self-regulation compared to more formal styles of regulation is not firmly established, but recent reports by the Monopolies Commission have called attention to restraints on competition associated with the self-regulation of the professions.

Table 2. **Examples of self-regulation in Germany**

| Sector/Economic activities | Players & regulatory powers |
|---|---|
| Craftsmen | **Chambers of Handicraft and Guilds:**<br>– Issue ordinances for examinations to become a journeyman; prepare and execute the exams (prerequisite to exercise the trade);<br>– Issue ordinances for examinations for master certificates;<br>– Oversight of apprenticeships;<br>– Specification and oversight of vocational training;<br>– Co-administration of vocational schools |
| Lawyers | **Chambers of Lawyers (federal and for individual court districts)**<br>– Issue licenses to become a specialist lawyer;<br>– Revocation of authorisations;<br>– Specification and supervision of professional duties. |
| Chartered Accountants | **Chamber of Chartered Accountants**<br>– Issue licenses to become a chartered accountant;<br>– Provide binding opinions to the authorities on the authorisation of new accountants;<br>– Provide opinions on the revocation of authorisations;<br>– Specification and supervision of professional duties; |
| Doctors | ***Länder* Chambers of Doctors**[38]<br>– Organisation of emergency services and further education;<br>– Specification and supervision of professional duties of doctors;<br>– Specification of vocational training of receptionists,<br>– Setting up of bodies for examining wrongful care. |
| Pharmacists | ***Länder* Chambers of Pharmacists**<br>– Organisation of emergency services;<br>– Specification and supervision of professional duties;<br>– Specification of supplementary training. |

The *Joint Rules of Procedure* includes basic consideration when to opt for self-regulatory solutions (see Box 10). 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, *cf.* Box 10.

Box 10. **"Regulated self-regulation"**

A recent research project commissioned by the German Federal Commissioner for Cultural and Media Affairs had as its objectives to create a "tool box" for government regulators enabling them to select suitable regulatory instruments for different regulatory issues. Based on the assumption that there is currently no regulatory choice theory serving as a framework for players to make such choices, the project used the concept of "regulated self-regulation" to describe the indirect ways by which government influence can be exerted on self-regulation. It concludes that the advantages of "regulated self-regulation" are high when the defined policy objectives are not considered to be "fundamental" to the public (thus requiring the certainty of command-and-control regulation), and when the interests of the participants of the industry are not contradictory, but to some extent overlap.

The project identified a set of actions and recommendations for governments when considering establishing a regulatory regime based on "regulated self-regulation". A regulatory framework should be outlined in an act of Parliament, empowering a regulatory body to regulate the specific processes. Key actions to consider when establishing a "regulated self-regulated" regime include:

- Defining a specific function for self-regulation within the regulatory framework;
- Defining the structure of the self-regulatory organisations, *i.e.* by stating requirements for such bodies;
- Carefully arrange the relationships ("working distance") between the involved institutions;
- Structuring the process rather than the content of self-regulation;
- Using or creating incentives;
- Establishing effective sanction mechanisms;
- Evaluate;
- Choose points where the public can have access to the process.

When the regulatory regime has been established, a range of tools should be considered in order to monitor and manage the self-regulated activities:

- Registration of codes;
- Certification of self-regulatory organisations;
- Power to the regulator to request a code;
- Legal powers to the regulator in the case of a failure of a code ("credible threat");
- Requirements for evaluation of codes and sunset clauses;
- Use sanctions where necessary;
- Granting rights for special groups, *i.e.* as counterparts to strong pressure groups;
- Deriving benefits from consumer complaints;
- Ensure publicity by way of public hearings and publishing draft codes;
- Ensure ways to collect and provide information.

*Source:* Schulz and Held (2002).

*Assessment.* Alternatives to traditional regulation are particularly used for the implementation of environment policies by professions regulating entry and education requirements. Recent public sector reform policies encourage and emphasise the benefits of alternatives to traditional command and control regulation. However the obligations set out in the *Joint Rules of Procedure* to systematically consider and assess the potential use of alternatives are not systematically complied with. Soft-laws are not exposed to the same scrutiny, transparency and accessibility that should be applied for traditional regulation. A proliferation of soft-laws and a simultaneous reduction in the growth of traditional regulation may therefore in fact reduce regulatory quality.

### *3.3. Understanding regulatory effects: the use of Regulatory Impact Analysis (RIA)*

The 1995 *Recommendation of the Council of the OECD on Improving the Quality of Government Regulation* emphasised the role of RIA in systematically ensuring that the most efficient and effective policy options were chosen. The 1997 *OECD Report on Regulatory Reform* recommended that governments "integrate regulatory impact analysis into the development, review, and reform of regulations." A list of RIA best practices is discussed in detail in *Regulatory Impact Analysis: Best Practices in OECD countries.*[39] This section describes the current RIA system in place in Germany, and assesses it against OECD best practices.

Germany was among the very first OECD countries to issue a regulatory checklist urging regulators to consider issues such as regulatory alternatives and legal quality of new regulation. As in other OECD countries the purpose of the 1984 *Blue Checklist* was not to prescribe or sanction specific quality assurance procedures, but rather to increase awareness of issues affecting regulatory quality. With the 1996 amendment to the *Joint Rules of Procedure*, it became mandatory for regulators to scrutinise and carry out assessments of all Bills on the basis of a marginally revised version of the 1984 *Blue Checklist*.

Though most likely contributing to a better understanding of regulatory quality issues, the influence of the Blue Test Questions on actual regulatory practices was limited by three factors. First, the Questions were not accompanied by specific guidelines on how to carry out the suggested tests. Second, there was no institutional and procedural set-up in place to support and promote the pursuit the regulatory quality agenda. Third, there were no sanctions for regulators for not addressing the Blue Test Questions.

In May 1998, as part of the Lean State Programme of the previous government, the federal Ministry of the Interior in co-operation with the Ministry of the Interior of Baden-Württemberg issued a RIA guideline including guidance on how to prepare cost estimates of regulatory impacts (*Arbeitshilfe zur Ermittlung der Kostenfolgen von Rechtsvorschriften*).

The "Modern State – Modern Administration" programme launched in 1999 includes 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. By July 2002, the Speyer Institute, with the involvement of Baden-Württemberg's Ministry of the Interior, had prepared three reports on RIAs for the Ministry of Interior:

- A RIA handbook (*Handbuch zur Gesetzesfolgenabschätzung*), providing a 355 page theoretical and scientifically based presentation of RIA methodologies and concepts. Published in December 2000.

- RIA Guidelines (*Leitfaden zur Gesetzesfolgenabschätzung*), providing a 26 page praxis-orientated introduction to the handbook. The guidelines present and exemplify the RIA concept. However it does not relate these considerations to government procedures as laid out in the *Joint Rules of Procedure*. Published in July 2000.
- Tests of the RIA handbook and guidelines (*Praxistest zur Gesetzesfolgenabschätzung*). Based on tests of the RIA handbook and guidelines carried out over a one-year period on eight selected laws and regulations, the report concludes that the majority of methods and instruments set out in the guidance material are indeed applicable. However the report also concludes that due to the different scope and urgency of laws and regulations, the available tests and methods can and should be applied differently. The report offers no recommendations on how to do this in practice, although it points out as one of its findings that institutionalisation of the RIA process is desirable.

The RIA concept developed and presented in these reports differentiates between three RIAs carried out at different stages of the regulatory process, *cf*. Table 3 below.

Table 3. **Conceptualising RIA in Germany**

| | **Timing / Objective** | **Key questions** | **Expected results** | **Suggested methodologies** |
|---|---|---|---|---|
| **Preliminary RIA** | Testing if regulation is necessary; identify and compare alternatives. | Which regulatory option can best support the regulatory objectives? What effects can be expected? When and for whom? | List of regulatory options – including not to regulate | Step-by-step process:<br>i) system analysis;<br>ii) precision of political aims;<br>iii) establishing regulatory alternatives;<br>iv) scenarios;<br>v) impact assessments |
| **Concurrent RIA** | To be used in early preparatory stages, as well as to test and examine drafts regulations | Do the planned regulatory measures match and suit the regulatees and the regulatory context? Can expected costs be reduced and benefits increased? | Confirmation, completion and improvement of the draft | Test methodologies (cost-benefit analysis, praxis-test; simulation, benefit analysis, etc.) |
| **Retrospective RIA** | After implementation, when operational experience is available | Were regulatory objectives achieved? Should the regulation be revised or up-dated? | Assessment of regulation (*i.e.* goal achievement, acceptance) and possible suggestions for change | Evaluation methodologies |

*Source*: Konzendorf (2000), Government of Germany (2000b).

It is important to note that the conceptual and detailed preparatory work on RIA is indeed conceptual and not sufficiently linked to the daily regulatory decision-making process.

The current RIA policy dates back to the September 2000 revision of the *Joint Rules of Procedure* for the Federal Ministries. The *Joint Rules* obliges regulators to prepare RIAs for all draft regulations (primary as well as subordinate legislation), and sets out some requirements for the RIA coverage and procedures.[40] RIAs must be prepared by the lead ministry in consultation with relevant Federal Ministries. The RIAs must indicate the calculations and assumptions behind financial impact assessments. RIAs must separately cover impacts on the following four areas:

- The federal budget;[41]
- *Länder* and local authority budgets;
- Costs to industry, and to small and medium-sized enterprises in particular;
- Unit prices, price levels in general and its effect on the consumer.

Procedurally, impacts of federal, *Länder* and local authority budgets must be prepared in consultation with the Ministry of Finance. Impacts on costs to industry, unit prices, price levels and consumers must be prepared in consultation with the Ministry of Economy. And the Ministry of the Interior is responsible for monitoring the general compliance with the requirements of the *Joint Rules*, including the obligation to prepare RIAs.

There is currently no guidance available for regulators on how to assess regulatory impacts on business or SMEs, or on how to calculate administrative burdens. The Ministry of the Interior is considering preparing a more operational RIA guide. The guideline is currently expected to be available by the end of the legislation period, *i.e.* in 2006. The Ministry of Economics and Labour in 2003 commissioned work on methodologies to improve the assessments of regulatory impacts on business. The report will be published at the end of 2004.

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, *c.f.* Section 2.2.

Current RIA activities and practices lack significantly behind the intentions and requirements set out in the *Joint Rules of Procedure* and in the current RIA guidelines. No draft regulations observed as part of this review was accompanied by a RIA carried out in accordance with the obligations set out in the *Joint Rules of Procedure*. In the mandatory justifications for new regulations (presented in the explanatory memoranda and a cover sheet) ministries often only note that regulations will have no costs or that the expected costs are not quantifiable. When provided, cost estimates are often rough approximations. Assumptions behind the estimates are mostly not made explicit.

Partially as a response to this, the federal parliament and in particular *Länder*, parliaments are showing an increasing interest in ensuring that bills presented to it by their governments are accompanied by high-quality impact assessments, and that amendments proposed by parliament committees during their deliberations can be subject to similar assessments, *cf.* Box 11, Section 2.3.1.

*Assessment against best practice*

*Maximise political commitment to RIA*. The use of RIA to support reform should be endorsed at the highest levels of government. 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.

*Allocate responsibilities for RIA programme elements carefully.* To ensure "ownership" by regulators, while at the same time establishing quality control and consistency, responsibilities for RIA should be shared between ministries and a central quality control unit. Experience in OECD countries show no exception to the rule that RIA will fail if left entirely to regulators, but will also fail if it is too centralised. 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.

*Train the regulators.* Regulators must have the skills to prepare high quality economic assessments, including an understanding of the role of impact assessment in assuring regulatory quality, and an understanding of methodological requirements and data collection strategies. All complex decision-making tools, such as producing adequate RIA, demand a learning process. 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.

*Use a consistent but flexible analytical method.* The OECD recommends as a key principle that regulations should "produce benefits that justify costs, considering the distribution of effects across society." A cost-benefit test is the preferred method for considering regulatory impacts because it aims to produce public policy that meets the criterion of being "socially optimal" (*i.e.* maximising welfare).[42] A guideline on the preparation of cost-benefit tests exists, but is not applied. There are no guidelines available on how to carry some mandatory impact assessments defined in the *Joint Rules of Procedure*, *i.e.*, price impacts and impacts on SMEs.

*Target RIA efforts.* RIA is a difficult process that is often opposed vehemently by ministries not used to external review or because of time and resource constraints. The preparation of an adequate RIA is a resource intensive task for drafters of regulations. Experience shows that central oversight units can be swamped by a large numbers of RIAs concerning trivial or low impact regulations. Ministries will have the tendency to prepare a RIA at the end of the process, completing it as a justification of the measure instead of as a powerful decision-making tool to be used from the beginning. Because of the danger of trivialising the exercise, it is vital from the outset to target RIAs for those proposals that are expected to have the largest impact on society. Current guidelines give no advice on the scope of RIA.

*Develop and implement data collection strategies.* The usefulness of a RIA depends on the quality of the data used to evaluate the impact. An impact assessment confined to qualitative analysis provides lesser accountability of regulators for their proposals. Since data issues are among the most consistently problematic aspects in conducting quantitative assessments, the development of strategies and guidance for ministries is essential if a successful programme of quantitative RIA is to be developed.

*Integrate RIA with the policy making process, beginning as early as possible.* Integrating RIA with the policy making process will, over time, ensure that the disciplines of weighing costs and benefits, identifying and considering alternatives and choosing policy in accordance with its ability to meet objectives become a routine part of policy development. If RIA is not integrated into policy making, impact assessment becomes simply an *ex post* justification of decisions already taken, and contributes little to improving regulatory quality. Integration is a long-term process, which often implies significant cultural changes within regulatory ministries. Early integration in the policy process of RIAs would require stronger incentives to do so and possibly sanctions for non-compliance, however more importantly it would require that policy makers be convinced of and request the added-value of RIA.

*Involve the public extensively*. Public involvement in RIA has several significant benefits. The public, and especially those affected by regulations, can constitute cost-effective sources of the data needed to complete high quality RIA. Consultation can also provide important checks on the feasibility of proposals, on the range of alternatives considered, and on the degree of acceptance of the proposed regulation by affected parties. 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*, para 42,1). In the public consultation process, any information about regulatory impacts on citizens and business are included in an "other costs" category of the one-page "front sheet" attached to the draft regulation.

*Assessment*. Germany has over almost 20 years developed and improved a series of methodologies and tests to assess *ex ante* regulatory impacts and regulatory alternatives. Today, well-developed concepts and explanatory guidance is available to regulators. Furthermore, the formal obligations for regulators to carry out RIAs have been increasingly strengthened by means of the *Joint Rules of Procedure* for the Federal Ministries.

However RIAs as required by government procedures and as envisaged in the available guidelines are not carried out on a regular basis. There are four reasons for this: first, there is no strong government-wide commitment at the political level to prioritise and support RIAs. Second, there seems to be a certain amount of scepticism and reluctance among regulators to use RIAs as a key tool and procedure to guide regulatory decision-making. At the same time there is also evidence of a general lack of awareness among regulators about the obligations to carry out RIAs and in particular about the guidance available. Third, the linkage between the available RIA concepts and explanatory guidance on the one hand, and the actual procedures for preparing regulations is weak. As a consequence, regulators face significant difficulties in targeting and sequencing RIA efforts. Fourth, 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.

Improving RIA practises and capacities will not only improve the quality of policy formation related to the flow of new legislation. RIA methodologies and approaches should also be applied to review existing regulatory regimes and practises, *cf.* Chapter 5 of this report.[43]

### *3.4. Building regulatory agencies*

In most OECD countries, economic structural reforms – promoted in part by international commitments – have prompted the establishment of independent regulatory agencies and the remodelling of existing regulators. These institutions are intended to provide neutral regulatory oversight in liberalised or privatised sectors, and prudential oversight of competitive markets. The design and management of such regulatory agencies constitutes an important component of regulatory management. Key issues in this respect include considerations on how to establish institutions that are:

- Competent, accountable and independent;
- At arms length from short-term political interference;
- Capable of resisting capture by interest groups, but still
- Responsive to general political priorities; and
- Have decision-making procedures that take into account the particularities of the area being regulated, while at the same time maintaining transparency and accessibility for all stakeholders.

The following subsection will provide a general overview of the independent regulatory institutions now in place for rail, financial and postal services, telecommunications, general competition policy, as well as pharmaceutical, food safety and social insurance. The performance of some of these institutions will be explored in more detail in other chapters of the report.

Regulatory agencies in Germany have been set up and designed on an *ad hoc* basis reflecting different circumstances of each sector. There is no general or overarching policy on the establishment, design, or functions of German independent regulators. In most cases, regulatory agencies in Germany are established by law as so-called Independent Higher Federal Authorities responsible to the ministry dealing with the relevant policy area (*Bundesoberbehörde im Geschäftsbereich eines Bundesministeriums*). Although the regulatory agencies differ significantly in terms of specific powers and tasks, they share a number of important characteristics:

*Powers.* The regulatory agencies concentrate on regulatory application and enforcement, with policy or normative matters as well as issuance of all subordinate regulations being the task of the ministries. Law authorises the regulatory agencies to take final executive decisions in individual cases, but the agencies are subject to general instructions from their supervisory ministry.

*Independence.* Regulatory agencies generally enjoy a high degree of independence. This results both from political choice and support and from statutory guarantees and protections, *cf.* above. Ministries rarely make use of their right to give general instructions.

*Accountability.* In legal and substantive terms, higher federal authorities and other regulatory agencies are accountable to the ministry to which they belong. However, as mentioned above the agencies are authorised by law to make final decisions in individual cases; and for any administrative decision regulatory authorities make, can be challenged in court. The political accountability of the independent authorities is in some cases ensured through annual or bi-annual activity reports. In the case of the Bundeskartellamt and RegTP, submission of these reports to the Bundestag is required by law. Though not required by law, some other regulatory agencies publish annual reports; others do not.

*Communication.* Transparency measures of regulatory agencies vary significantly. Although specific rules exist for some regulators, there is no general rule or guideline in place on how to publicise and communicate activities and decisions, nor to publish annual activity reports. In the case of the RegTP and the Bundeskartellamt, law requires that general instructions from the minister be published in the Federal Gazette. Law also requires that decisions by RegTP on a number of topics be published in the RegTP Gazette and that BAFin publishes its guidelines in the Federal Gazette. By law, the Bundeskartellamt is obliged to publish certain decisions; however, at its own discretion, the Bundeskartellamt publishes all its decisions on its Web site. The same goes for several other regulatory authorities.

*Management and appointments.* Regulatory agencies are headed by a president and vice-president(s) appointed by the Federal President after being nominated (with cabinet consent) by the Minister in charge. Announcements of presidents and vice-presidents usually follow extensive internal government consultations as well as with opposition parties, with final nominations reflecting the relative strength of the dominating political parties.

Law requires the establishment of advisory councils for BAFin and RegTP, advising or monitoring the regulators' activities. In the case of RegTP the Council consists of members of the German Parliament. The Council makes proposals to the government on the appointment of the president and vice-president; it participates in decisions taken on measures to ensure universal service; and it advises RegTP in the preparation of its activity reports. In the case of BAFin, an advisory council composed of representatives from financial enterprises and consumer protection associations as well as academics provide general advice to BAFin and gives recommendations on the further development of supervisory practices. The Supervisory Board, attached to BAFin is an administrative council composed of 21 members from the Federal Ministry of Finance and other ministries, members of the Bundestag as well as representatives for credit, financial and insurance companies. The administrative council supervises the executive level of BaFin; it advises it on how to fulfil its specific tasks; and it decides on BAFin's budget.

*Resources / funding.* The bulk part of the resources available for regulatory agencies are provided via the federal budget. The funding is integrated in the respective ministries' overall budgets, but the appropriations appear as separate items in ministries' budget plans. Funding by fees and charges varies from 2.92% (BVA) to 100% in the case of BAFin, where the cost of supervision is entirely borne by industry**.**

*Consultation and decision-making procedures*. The Act on Administrative Procedures provides a general framework for decision-making procedures of all administrative bodies (obligation to provide reasons for decisions in writing, general appeal mechanisms, obligation to consult with stakeholders on important decisions; and obligation to communicate decisions). In the case of federal ministries, binding rules on the implementation of these general obligations are provided by way of the *Joint Rules of Procedure*. However, the *Joint Rules of Procedure* does not apply for the regulatory agencies. Each of the independent regulators can establish such procedures individually. As a consequence, regulators have developed different decision-making mechanisms.[44] There is no government overview over the quality assurance mechanisms or criteria applied in these decision-making procedures (*i.e.* timing and scope of consultation procedures, communication of decisions, impact assessments, etc.) nor on whether such mechanisms are systematically applied or monitored.

*Administrative appeals and public redress.* For decisions made by regulatory agencies, the first instance appeal is in most cases the regulatory agency itself. This appeal has to be exhausted before the plaintiff can raise a case before a court. If the authority has not answered the appeal within three months, the plaintiff can launch an appeal in court. Silence is consent or denial rules do not apply. For decisions of RegTP there is no first instance appeal; the issue must be brought directly before the court. Appeals from Competition Act decisions by the Bundeskartellamt and by the sectoral regulators are taken to the district court in Düsseldorf. Complaints normally have delaying effect on the implementation of the regulator's decision. This has especially been the case in the postal market.

*Co-ordination.* The *Joint Rules of Procedure* does not prescribe a systematic or mandatory involvement of the independent regulatory agencies in the regulatory process, *i.e.* a requirement for all ministries to consult with the Bundeskartellamt on issues that may have effects on competition. Regulators (except for RegTP) are not required by law to consult with the Bundeskartellamt on issues pertaining to competition. Decisions to invite regulatory agencies in the preparation of new regulations are made on an *ad hoc* basis by the ministry to which the regulatory agency belongs. However practice prescribes a

significant degree of horizontal co-ordination between the regulatory agencies. Most importantly, the German institutional framework has developed a system of concurrent powers to deal with the relationships between the regulators and the application of the general competition law. Concurrence mechanisms are used in several areas to ensure a consistent and unanimous implementation of competition principles. A number of specific requirements ensure an on-going co-ordination between RegTP and the Bundeskartellamt.[45]

*Establishing an independent regulator for gas and electricity.* In March 2003, the German government announced the establishment by 1 July 2004 of an independent regulator for the gas and electricity sectors. The decision to establish the regulator is in line with EU requirements, and follows a long and still on-going debate on how to establish a regulatory framework that can credibly support transparency and market access in extremely heterogeneous sectors without hampering competition and market dynamics.

Regulatory agencies can be designed in many different ways. Components include the role (or "mission") they are assigned, their governance, the specific regulatory functions and processes, the resources and internal management of the agency, the start-up strategy and other factors. Table 4 identifies these dimensions and related issues that seem particularly relevant for the establishment of an independent electricity and gas regulator in Germany (RegSG). Based on observations of the German context and experience in other OECD countries, the table provides some tentative guidance, ideas and suggestions on how to approach the establishment of RegSG. The purpose is not to provide definite answers, but to establish a checklist of issues – where possible against the experience already accumulated in Germany and among other OECD countries.

Experience from OECD countries indicates that design of regulatory organisations reflects the scope of the regulatory functions allocated to the regulators. There is, not surprisingly, an important relationship between overall design issues such as objectives and powers given to a regulatory agency, and more concrete governance issues such as co-ordination with other authorities and the specific regulatory functions attributed. This implies the importance of sequencing a design process by addressing overall design issues first, followed by considerations on specific governance issues. At the same time organisational design depends on the institutional context. The task of regulation becomes more complicated as the number of objectives increases. Institutional design is just one step in the process. The actual regulatory incentives developed by the agency will affect the behaviour and performance of the regulated entities. Competitive pressures can be powerful determinants of industry performance.

*Assessment*. German regulatory agencies enjoy a high degree of autonomy. At the same time their relatively close formal relationship to ministries allows for the communication of general instructions reflecting overall political priorities. The regulatory agencies' professional expertise and integrity is generally well regarded. The regulators have also been granted wide discretion in their choice of preparing, consulting and communicating regulations and guidelines. As a result, practices in this vary. There is no government overview over the quality assurance mechanisms or criteria applied in these decision-making procedures nor on whether such mechanisms are systematically applied or monitoring. There is scope for improving the transparency, for example by improving and/or requiring systematic reporting on quality assurance measures and announcement of decisions from all regulatory agencies, as well as by integrating Parliament more in the process of appointing regulators, *i.e.* in the form of public hearings.

Table 4. **Designing regulatory agencies: the case of RegSG**[46]

| Area | Design Issue | RegSG issues | Observations & OECD Experiences |
|---|---|---|---|
| **Mission** | Objectives of the regulator | ▪ Should RegSG only focus on price terms of network access and dispute settlement only?<br>▪ Should it – and to which extent – take on tasks related to investment, security of supply, minimum service requirements, and distributional objectives? | ▪ Experience suggest that there may be significant problems of accountability, trade-offs and performance monitoring when regulatory objectives of arms-lengths agencies go beyond economic regulation, *i.e.* including social policy and distributional objectives.<br>▪ Experience suggest important synergies from internalising in regulators agencies responsibilities for short term as well as long term sustainable supply |
| | Jurisdiction (powers) | ▪ Should RegSG have the powers to regulate the monopolies or simply approve agreements reached by the incumbents?<br>▪ Should RegSG only be allowed to suspend anti-competitive behaviour/abusive access conditions or should it also be allowed to force market participants to take pro-competitive action (*e.g.* by removing bottlenecks)?<br>▪ What should be the relation to the competition authority (BKartA)?<br>▪ Should the minister in charge be able to overrule RegSG decisions? If so, which decisions should fall under such an exception rule? | ▪ The complexity of the German gas and electricity sectors indicates there may be benefits in terms of knowledge and specialization from keeping the regulatory and the competition authority separate;<br>▪ Past experience indicates competition law alone will be unlikely to prevent abusive pricing;<br>▪ Experience from OECD countries suggests that some overlap between regulatory authorities may offer more effective monitoring, reduce risks of capture and facilitate specialisation;<br>▪ Germany should build on past good experience with regulators' concurrent powers in for example telecoms regulation. |
| | Industry coverage | ▪ Should there be one regulator or two separate regulators for electricity and gas? | ▪ Multi-industry regulators can: generate savings and accumulate knowledge from shared activities (information collection, administration, access regulation);<br>▪ Reduce risk of capture or undue political influence because of reduced dependency on any particular industry or group;<br>▪ Avoid distortions in the investment of the regulated firms induced by regulatory inconsistencies across industries particularly when the activities concerned are substitutes as in the case of electricity and gas;<br>▪ Industry-specific regulators may have the advantage of greater specialisation and focus, and may be more effective when the regulation of the different industries differs widely. |

| Area | Design Issue | RegSG issues | Observations & OECD Experiences |
|---|---|---|---|
| **Internal Governance** | Decision-making structure | ▪ Should decision making be based on the BKartA model of "decision-making units" or BAFin's "hierarchical model"?<br>▪ Single regulator or a board of directors? | ▪ German experience offers rich opportunities to build on and adapt decision-making structures that have proven workable with other regulatory agencies.<br>▪ A board may be better insulated from conflicts of interest and regulatory capture given that it reflects multiple perspectives. However, this potential remains in a multi-member context where there may be pressure for a board to be appointed to reflect a range of political views or to represent the interests of various stakeholders<br>▪ A one-person regulator may be more clearly accountable and predictable, making decisions faster and being more economical. |
| | Human resources | ▪ How to attract and maintain competent and highly specialised staff? | ▪ Consider measures to ensure that salaries could be set at market levels and exempted from civil service compensation rules if necessary.<br>▪ Alternatively civil service compensation rules could be reformed (as already envisaged) to enable better remuneration of good performance and to attract highly qualified staff,<br>▪ External consulting services to procure particular services and draw on specialised training programmes may be relevant, especially during the start-up phase. |

| Area | Design Issue | RegSG issues | Observations & OECD Experiences |
|---|---|---|---|
| **Regulatory activities** | Functions | ▪ How should anticompetitive conduct be addressed?<br>▪ Should regulation be *ex ante* or *ex post*, *i.e.* should operators/utilities be obliged to have their prices or calculation methods approved as soon as network access is requested or are prices/methods checked *ex post* upon request by competitors/customers?<br>▪ Should RegSG have the power to impose fines (like BKartA) if abuse network access conditions or prices are found?<br>▪ How is the considerable number of utilities in Germany to be dealt with? Should individual access prices be approved for every utility or should merely pricing-methods/rules be approved? If the former is the case, how could delays due to the number of cases that have to be decided be avoided?<br>▪ How should vertically integrated utilities (and the possibilities they have for cross-subsidisation) be dealt with? | ▪ The structure of electricity and gas sectors in Germany suggests these will be larger problems than in other places, and the potential for externalities suggests the EU might need to play a more prominent role.<br>▪ The German Monopoly Commission has argued favorably for *ex ante* regulation of network access as the most decisive factor for installing competition in the utilities sector;<br>▪ Key factors determining outcomes beneficial for consumers are, among others, credible and severe sanctions for attempts to exploit monopoly powers;<br>▪ Ensure proper capacities and procedures to assess and consult expected impacts of decisions / regulations issued;<br>▪ Ensure that regulations adhere to OECD's 1995 recommendations on regulatory quality. |
| | Process and appeals | ▪ How can decisions be effectively implemented without compromising the rule of law? Should there be conflict settling mechanisms below the level of the courts? Should market participants be involved in setting rules to increase acceptance and hence compliance? | ▪ Experience from the RegTP legislation points to the need to ensure – to the extent possible – that the founding regulation is carefully scrutinised for potential conflicts and areas open for interpretation. Such doubt should to the extent possible be clarified *ex ante* in order to avoid implementation delays and extensive use of the legal system;<br>▪ Ensure that founding legislation sets out frameworks for dispute resolution procedures, while safeguarding transparency mechanisms |
| | Co-ordination with other authorities | ▪ What should be the specific role of the *Länder* authorities (LKartA)? Would RegSG be responsible for all cases or only for cases involving two or more *Länder*? | ▪ Sub-national regulators' responsibilities generally include regulation and enforcement of activities with no impact on other states,<br>▪ Responsibilities of federal regulators generally include enforcement and regulation of activities that meets interstate and international trade. |

| Area | Design Issue | RegSG issues | Observations & OECD Experiences |
|---|---|---|---|
| **Accountability and independence** | Reporting and auditing | ▪ What should be the trade-off between independence and accountability?<br>▪ Should RegSG report to parliament, to the minister or both?<br>▪ What accountability measures should be applied? | ▪ Ensure clear accountability mechanisms, as a minimum in the form of annual reporting to Parliament.<br>▪ In accordance with powers vested to the regulator, carefully clarify sharing of accountability between the regulatory agency and the minister. |
| | Independence safeguards | ▪ How is stable and secure funding ensured? | ▪ Independence could be enhanced and safeguarded by making federal budget appropriations appear as independent items in the budget (not integrated in the responsible ministry's overall budgets) and by being predominantly funded by industry fees and contributions. |
| | Appointment and dismissal of regulators (president and vice-presidents) | ▪ Made by parliament or by government?<br>▪ Should stakeholders be involved or not? If so, who counts as stakeholder?<br>▪ How can the appointment of top officials be made transparent? What is the role of Parliament in this context?<br>▪ Staggered terms to avoid politicisation? | ▪ In OECD countries appointments are often confirmed by parliament following government nomination; stakeholders are often excluded from the selection process in order to avoid conflicts of interest and protect independence.<br>▪ Transparency in the selection process may be enhanced by systematically making use of Parliamentary hearings as part of the selection process, and by requiring Parliamentary approval of regulatory agencies' top officials. |
| **Transition issues** | Start-up strategy | ▪ How to ensure a "running start" and smooth "unbundling" from activities under RegSG and *Länder* authorities?<br>▪ Avoid damaging market speculation in change in regulator behaviour?<br>▪ Should there be a specific model for the transition from *ex post* to ex ante regulation?<br>▪ Sunsetting of the law establishing RegSG | ▪ The timing of the agency set-up, either before or after reform, has an impact on the stakeholders' perception of reforms and determines the role of the agency in setting the regulatory framework;<br>▪ Start-up funding, particularly if the agency's founding precedes reforms, may be provided by a government allocation;<br>▪ Temporary staff on secondment from industry or ministry may provide specialised skills that are unavailable elsewhere. |

*Sources*: Ocana (2002); OECD (2003c).

## 4. DYNAMIC CHANGE: KEEPING REGULATION UP TO DATE

Germany's regulatory quality agenda has since the mid 1980s been driven by concerns of excessive and obsolete regulations, administrative burdens and over-bureaucratic procedures. Although an increasing emphasis on *ex ante* assessments has emerged, de-bureaucratisation continues to be one of the most significant drivers and key components in Germany's efforts to improve regulatory quality. Reduction of administrative burdens – *Bürokratieabbau* – was an important focus point in the 1999 Modern Government – Modern Administration programme. It also had a prominent role in the 2002 Government Coalition Programme, and remains among the high priorities of the government's programme "Agenda 2010 of April 2003: Courage for Change".[47]

New initiatives as well as on-going, existing initiatives are brought together in the February 2003 *Master Plan* to reduce bureaucracy, *cf.* below. While setting out very broad and ambitious goals, the quantification of these goals and the specific contribution to this by supporting projects is still not clear.

Box 11. **Federal Government Initiative to Reduce Bureaucracy**

The *Federal Government Initiative to Reduce Bureaucracy* was launched by the German Government on 9 July 2003. The initiative is based on a *Master Plan to Reduce Bureaucracy – Promoting Small Business, Creating Employment, Strengthening Civil Society* from February 2003.

The announced approach of the initiative is to concentrate on a few crucial areas of activity, and to make targeted and noticeable reduction of administrative burdens for as many citizens and businesses as possible. In doing so, the initiative focuses on five strategic areas of action: the labour market and self-employment, small business and the private sector, research and technology, civil society and volunteering, services for business and citizens.

The initiative is an umbrella project into which new and existing bureaucracy-reducing projects are continuously integrated. As per 9 July 2003, it included 54 projects,[48] among others:

- BundOnline 2005, the German Government's e-government initiative;

- Simplification of official statistics and reporting requirements for business;

- Technical review of existing legislation with a view to identifying and removing obsolete and superfluous statutes;

The February 2003 Master plan envisaged that the initiative would create "specific bureaucracy reduction goals" for each individual measure. However the Initiative in its current version does not include such targets or measures, nor considerations on developing methodologies that would enable quantitative measurement of, for example, administrative burdens imposed on business.

A Steering Committee of State Secretaries from the ministries of the Interior (chair), Finance, Justice, Economic and Labour as well as the Chancellery chief-of-staff is charged with implementing the plan, supported by the Secretariat located in the Ministry of the Interior. The Committee does not report to the Committee of Permanent Secretaries responsible for directing and implementing the Modern State – Modern Administration programme.

### *4.1. Revisions of existing regulations*

Over the years, most OECD countries have accumulated a large stock of regulation and administrative formalities. If not checked or reviewed these can lead to a highly burdensome regulatory system. The OECD *Report on Regulatory Reform* recommends that governments systematically review regulations to ensure that they continue to meet their intended objectives efficiently and effectively.

Germany has expended substantial effort on its reviews of existing legislation. Table 5 shows the number of primary and secondary legislation repealed over the last 10 years. The increase in repeals in 1994, 1998 and 2001-2002 coincide with the end of federal electoral terms and the associated peaks in legislative activities, *cf.* Figure 1. New regulations often include repeals of the regulations they replace. There is no systematic policy in place to review its existing laws and regulations, but recent initiatives constitute important steps towards the establishment of an integral concept for reviewing and updating existing regulations.

Table 5. **Repealed federal laws and subordinate regulations in Germany**

| | **1992** | **1993** | **1994** | **1995** | **1996** | **1997** | **1998** | **1999** | **2000** | **2001** | **2002** |
|---|---|---|---|---|---|---|---|---|---|---|---|
| Primary legislation | 29 | 15 | 48 | 15 | 12 | 21 | 34 | 14 | 12 | 40 | 20 |
| Secondary legislation | 114 | 127 | 170 | 79 | 89 | 157 | 172 | 89 | 74 | 125 | 122 |
| Total | 143 | 142 | 218 | 94 | 101 | 178 | 206 | 103 | 86 | 165 | 142 |

Source: The Government of Germany.

The principle of reviewing existing laws is already enshrined in rudimentary form in the *Joint Rules of Procedure*. The *Joint Rules* 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.[49]

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 *Monopolkomission* and the *Bundeskartellamt* in their bi-annual reports to the Bundestag also submit views on selected aspects of regulation.[50]

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. Consecutive work undertaken since the 1980s by the *Waffenschmidt, Schlichter* and *Ludewig* Commissions (named after its chairmen) as well as the *Lean State* Commission identified and analysed regulations in need of reviews, and "operationalised" the suggested revisions into concrete bills implementing many of the proposed simplifications. In terms of revisions of existing regulations, the most significant outputs of this work were a 1996 act that accelerated planning and permit procedures. Furthermore, 15 federal laws and 30 administrative orders were abolished, and 400 other regulations were revised.[51]

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.

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. In stead, 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.

*Assessment.* The review requirements already set out in the *Joint Rules* to consider time limits and assess the effectiveness and cost-efficiency of regulations are important steps towards ensuring systematic improvements of regulations in force. 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.

### *4.2. Reducing administrative burdens*

Efforts to reduce administrative burdens and simplify government procedures have been and still are among the most prominent and persistent features of regulatory quality management in Germany. At the political level, reduction of administrative burdens is often at the centre of government policy programmes. Organisationally, the "fight against bureaucracy" is now part of the Initiative to Reduce Bureaucracy, *cf.* above, led by the Ministry of the Interior. A dedicated unit in the Ministry of Economics and Labour is charged specifically with reducing administrative burdens for SMEs.[52] Recent federal initiatives to reduce administrative burdens are listed in Box 12.

Box 12. **Recent federal initiatives to reduce administrative burdens**

*Mail box suggestions*. In 2001 the Ministry of Economics and Labour published a report with 80 measures to reduce administrative burdens. The measures were based on an invitation in 1999 to business organisations and business to provide concrete suggestions to burdens for business.[1] The measures – some of which are still in the process of being implemented – primarily consist of marginal and practical adjustments of existing administrative procedures. No assessments have been made of cost-savings or other gains of the project.

*The Digital Townhall*. A pilot project, Media@Komm, launched in 2000 in three municipalities makes a large number of local government services available on-line. The objective is to simplify and accelerate citizen-local government transactions as well as to improve internal administrative processes. Services available on-line include building applications, public tendering, business promotion schemes as well various reporting obligations.

*Standard nationwide business number*. A pilot project launched in Bavaria in 2002 introduces the use of standard nationwide business numbers. The results are currently being assessed with regard to possible nationwide introduction.

*Health insurance: simplification of communication and standards.* In 2000, the statutory health insurance funds standardised their benefit forms. A system developed by the Ministry of Economics and Labour has enabled electronic and simplified communication procedures between employers and insurance funds. Information about cost-savings and other effects is not available.

*Reporting on line.* Since 2000, German companies can use the Internet to provide obligatory information to the Federal Statistical Office for some statistical surveys. Information required by other authorities is reported through other channels, some of which are electronic.

*"JobCard."* A pilot project launched in 2002 introduced a JobCard for employees. The card and its supporting software systems will allow the publicly run employment services to electronically access information about unemployed seeking work, employment periods, pay level information, etc. The project intends to accelerate and facilitate the approval of employment benefit claims. No information is available on the expected or realised savings and other results of this project.

*Laws and regulations on line*. By mid 2003, the Ministry of Economics and Labour expects to make information about the legal framework and procedural requirements for start-ups available on the Internet.

*BundOnline 2005*. Launched in 2000, the German Government's e-Government plan BundOnline 2005 has as its main objective to provide online those of its nearly 400 services that can be placed on the Internet, by 2005. The project is also expected to drive comprehensive administrative reforms by enabling significant simplifications of government structures and internal procedures. Headed by the Ministry of the Interior, the project has a total budget of EUR 1.43 billion to be spent primarily on the specialist application in departments and on reorganisation projects.[2] When fully implemented, the government expects BundOnline 2005 to provide annual savings of EUR 400 millions. As per July 2003 a total of 200 federal administrative procedures and services were available from federal portal *www.bund.de*.

1. However 71% of the responses either did not address particular regulations or they were not able to point to concrete burden or barrier problems stemming from an identified regulation. (Ministry of Economics and Labour, 2001: 5-6). These could also be seen as a reflection of the problems which large, consensus-driven German organisations face in providing specific suggestions to reduce administrative burdens. With most administrative regulations providing some kind of benefits to specific, veto-equipped members of large business organisations, it has sometimes been necessary for business organisations to resort to very general recommendations to the government on how to reduce administrative burdens.

2. Ministry of the Interior, 2003.

Measures to reduce administrative burdens in Germany are primarily applied *ad hoc* and *ex post*. The *Joint Rules* does not explicitly oblige regulators to consider, estimate, and include in their RIAs the anticipated administrative burdens imposed by new regulation. The Government has not set out specific targets for the reduction of administrative burdens imposed by federal regulation.

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 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, *cf.* Box 13.

*Assessments.* 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.

Box 13. **Monitoring and measuring administrative burdens**

The **United States** operates a highly developed, comprehensive and centrally enforced programme for analysing and clearing individual government information collection requirements. The Paper Work Reduction Act (PRA) intends to minimise the amount of paperwork the public is required to complete for federal agencies. The Act requires federal agencies to request approval from the Office of Management and Budget (OMB) before collecting information from the public. The OMB has the responsibility to evaluate the agency's information collection request by weighing the practical utility of the information to the agency against the burden it imposes on the public. Agencies must publish their proposed information collection request in the Federal Register for a 60-day public comment period, and then submit the request to OMB for review. In seeking OMB's approval, the agency needs to demonstrate that the collection of information is the most efficient way of obtaining information necessary for the proper performance of the agency's functions, that the collection is not duplicative of others the agency already maintains, and that the agency will make practical use of the information collected. The agency must also certify that the proposed information collection "reduces to the extent practicable and appropriate the burden" on respondents, including, for example, small business, local government, and other small entities. Since 1980 the OMB has set varying quantitative targets for the reduction of information collection burdens.

Another example of an advanced system for measuring administrative burdens is the MISTRAL methodology developed and employed in **the Netherlands**. MISTRAL works in three stages: first, all "data transfers" between a business and the authority are clearly identified (*e.g.*, a document, a telephone call, an inspection, etc.); second, the time involved in each "data transfer" and the level of expertise of the person performing the task are determined; third the data are computed to produce estimates for the administrative burdens incurred by the information requirement under review. Burdens are quantified in time as well as in monetary terms. MISTRAL has been used to quantify administrative compliance costs of very different laws and regulations, including legislation concerning working conditions, the environmental, annual accounts, corporation tax, and social premiums. The Dutch government has set up successive policy goals for the reduction of these administrative burdens: minus 10% by 1998, and minus 25% by 2003, compared to the 1994 baseline.

**Norway** also has a sophisticated regime for measuring and monitoring administrative burdens on enterprises. The Register of Reporting Obligations for Enterprises maintains a constantly updated overview of businesses' reporting obligations to central government. Law obliges public authorities to co-ordinate their reporting requests to business. The register also maintains an overview of permits required to operate within various business and industries, and provides information on how to obtain such permits. On a half-yearly basis, the register publishes estimates for the total reporting obligations imposed on business by central government. The Register is responsible for the methodology and for collecting burden estimates, whereas individual ministries and agencies are primarily responsible for measuring the actual burden of a reporting obligation. Burdens are measured in time spent on filling forms and preparatory work for the reporting obligation. Norway does not have a quantitative, government-wide target for the reduction of administrative burdens

*Source:* OECD (2003*a*).

## 5. CONCLUSIONS AND RECOMMENDATIONS

### *5.1. General assessment of current strengths and weaknesses*

German regulatory management and reform is based on a sound basis of consensus-driven, elaborate legal regulations and high respect for the rule-of-law. The constitutionally delineated co-operative federalism ensures a thorough involvement of the *Länder* in the federation's regulatory process, and a high degree of decentralisation and devolution to local governments. The qualities of this model and the capacities to adapt it have earned Germany's public administration much recognition in terms of reliability, legality and honesty.

Regulatory management and reform at the federal level has been and remains primarily driven by efforts to de-bureaucratise and reduce administrative burdens imposed on businesses, especially addressing concerns of small and medium-sized enterprises. As seen in the recent Agenda 2010, many regulatory management and reform initiatives remain an integrated part of governments' SME-policies.

Recent years have seen an increasing appreciation at political and administrative levels of the need to broaden the scope of regulatory policies and of the potential benefits this may offer in terms of better, more cost-efficient regulation. The development of a RIA concept and launching of a government-wide flagship project to reduce administrative burdens bear witness to this. At the same time, the context of these key projects illustrates some of the challenges now facing regulatory management in Germany. In the case of RIA, implementation is hampered by the absence of practical rules and enforcement mechanisms linking the RIA concept to the regulatory process, and by insufficient support politically as well as in the administration to pursue RIAs comprehensively and consistently. In the case of the high profile initiative to reduce administrative burdens, there is a risk that the absence of an overall government regulatory policy distorts efforts towards this particular (though very important) aspect of regulatory quality at the expense of other issues on the regulatory quality agenda.

The fundamentals of German regulatory governance are important assets to maintain a sound regulatory framework. However if not balanced and supported by other principles, these strengths may also pose challenges for regulatory quality and efficiency, and thereby hamper the fundamental contribution of regulatory governance in structuring and informing policy choices.

The findings of this report suggest that three mutually supportive levels or approaches to improving regulatory governance in Germany can be distinguished. The approaches differ in terms of the time-scale needed to prepare and implement them and in terms of the obstacles that need to be overcome. First, a number of relatively easily adjustable changes could be implemented probably at low economic and political costs, but with an important impact on regulatory quality and transparency. These changes would include, in particular, a more systematic and coherent approach to consultation and communication of regulations. Other initiatives to this effect would include making current guidance on how to prepare RIAs more operational and clearly linked to regulatory process, and to finalise as soon as possible additional guidance already planned.

A second and supportive approach includes measures to improve the institutional and procedural framework supporting regulatory management in Germany. A number of leading OECD countries have found that a successful strategy to long-term pursuit of regulatory quality includes an explicit regulatory policy developed and monitored by a permanent committee of ministers, high-level officials and/or representatives from business and labour organisations, and supported by a central government unit with the capacity and competence to guide, monitor and possibly exercise elements of control over the regulatory process. Two other issues also merit attention in this context. First, there seems to be scope for ensuring a more comprehensive approach to safeguard transparency of the activities of independent regulators. Dealing with the challenge of designing a new independent regulator for gas and electricity, Germany should benefit from the experiences and on-going discussions in many OECD countries on how to ensure and balance transparency, accountability, and independence. Second, there seems to be scope for improving the efficiency of the federal policy formation process without compromising the constitutional fundamentals of German federalism. The extended use of expert commissions in order to shortcut potential "systemic gridlocks" during the preparation of large reforms, as well as considerations to establish a parliamentary commission to propose constitutional reforms supportive of a clearer separation of *Länder* and federal powers bear witness to this.

Third, to ensure an administrative culture supportive of regulatory quality management, the German government should aim to complement the legal quality perspectives already covered in the regulatory process with stronger emphasis on economically based justifications and assessments. A clear preference for legal details and technicalities is still pervasive in the preparation or application of regulations. This *modus operandi* is not yet balanced with efficiency tests. In the long run, improvement of regulatory management in Germany is contingent on a stronger appreciation and integration of economic perspectives and implications of the regulatory process. Training for practitioners in using and adapting regulatory tools contributes to this end. Taken together, these components could constitute important elements in a comprehensive regulatory policy.

### *5.2. Policy options for consideration*

This section identifies actions based on international consensus on good regulatory practices and on concrete experience in OECD countries that are likely to improve regulation in Germany. They are based on the recommendations and policy framework of the 1997 OECD *Report to Ministers on Regulatory Reform.*

#### 1. *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 – as set out in the recommendations below.

#### 2. *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.

#### 3. *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. Similar arrangements to ensure high-level political attention and accountability to regulatory reform have been successfully adapted in the Netherlands and South Korea.

**4.** ***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, advice, 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.

**5.** ***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; reduce the proliferation of sector-specific administrative procedures, and work towards reduction of current exceptions.

**6.** ***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.

**7.** ***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 *(cf.* above*)*. 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.

**8.** ***Consider a general regulatory governance framework for independent regulatory authorities***

Germany should consider establishing a general framework for the accountability and quality assurance mechanisms applied by independent regulatory authorities. The German system of regulators has been developed *ad hoc* and explicitly for the sectors and the market characteristics in which they operate. This approach has many advantages which should not be lost. However Germany should consider developing a general framework for the use of RIA, communication, consultation and other quality assurance measures applied by the independent regulators. Such frameworks may provide benefits in terms of improved transparency and accountability. Furthermore, in its ongoing consideration on the design of a new independent regulator for gas and electricity, Germany should benefit from the experience in many OECD countries.

**9.** ***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*.

**10.** ***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.

## ANNEX 1: DIVISION OF REGULATORY POWERS ACROSS LEVELS OF GOVERNMENT

| Policy Area / Public Service | EU level[1] | Federal level | *Länder* level | Municipal level[2] |
|---|---|---|---|---|
| National defence | | Exclusive legislative power | | |
| Foreign relations | Authority to conclude treaties under international law in accordance with the powers conferred in the Treaty; Establishing the European Community (TEC); Exclusive power for foreign trade policies | Exclusive legislative power | | |
| Police | | Exclusive legislative power in specific selected areas (border guard, co-operation between the Federation and the *Länder* in the criminal investigation department and the protection of the constitution, establishment of the Federal Office of Criminal Investigation (BKA), combating of international crime | Exclusive legislative power for averting general dangers | |

1. The reference to exclusive or concurrent legislative power in the column "Federal level" refers to the division of powers as defined by the Basic Law. This division of powers is eclipsed by Community law, the application of which overrides that of the national law. The division of powers between the EU level and Member States is not governed by subject matters (*i.e.* there is no catalogue of powers). Rather, the EU has final competencies to achieve specific objectives, under the principle of what is called limited empowerment. As a rule, these are not exclusive competencies (exceptions: common customs tariffs; common monetary policy): where these powers have not yet been exercised, Member States may legislate themselves. The EU may act within the scope of authorisation.

2. According to the Basic Law, the muncipalities are part of the *Länder*: the municipalities are responsible for all matters of the local community; these are dealt with independently (responsibility for each and every aspect of public life); for other associations of municipalities, the responsibilities depend on what tasks have been allocated to them.

| Policy Area / Public Service | EU level[1] | Federal level | *Länder* level | Municipal level[2] |
|---|---|---|---|---|
| Courts | | Concurrent legislative powers for judicial organisation and judicial proceedings<br><br>Establishment of courts of first instance in individual selected areas and at supreme courts of the Federation | Legislative power in so far as the Federation has not introduced any regulations or no need for federal legislation applies<br><br>Establishment of courts of first instance and courts of appeal | |
| Monetary policy | Monetary policy virtually completely integrated at Community level for "euro countries" since 1 Jan. 1999; EC possesses exclusive legislative power in the area which has been integrated at Community level | Exclusive legislative power | | |
| Airports | Concurrent legislative powers within the scope of authorisation allocated by the TEC (*e.g.* approval of ground handling services) | Exclusive legislative power for air transport (including approval and installation of ground facilities) | | |
| Electricity | Concurrent legislative powers within the scope of authorisation allocated by the TEC (in particular harmonisation of the internal market) | Concurrent legislative powers for the energy industry | Legislative power in so far as the Federation has not introduced any regulations or no need for federal legislation applies | Regulation of local public services within the available legal scope via by-laws |
| Gas | Concurrent legislative powers within the scope of authorisation allocated by the TEC (in particular harmonisation of the internal market) | Concurrent legislative powers for the energy industry | Legislative power in so far as the Federation has not introduced any regulations or no need for federal legislation applies | Regulation of use at local level |

| Policy Area / Public Service | EU level[1] | Federal level | *Länder* level | Municipal level[2] |
|---|---|---|---|---|
| Water | Concurrent legislative powers within the scope of authorisation allocated by the TEC (environ-mental policy; harmonisation of the internal market, where appropriate.) | Framework legislation for the management of surface and ground water | Legislative competence for elaboration of the Federation's framework law | Regulation of water extraction at local level |
| Road transport | Concurrent legislative powers within the scope of authorisation allocated by the TEC (transport policy, trans-European networks) | Concurrent powers of legislation | Legislative power in so far as the Federation has not introduced any regulations or no need for federal legislation applies | |
| Public transport | Concurrent legislative powers within the scope of authorisation allocated by the TEC (transport policy, trans-European networks); harmonisation of the internal market (*cf*. law governing the award of contracts) | Concurrent powers of legislation for rail transport (railways, tramways, underground and elevated railways) | Legislative power for cable railways, omnibuses and magnetic cushion railways | |
| Rail | Concurrent legislative powers within the scope of authorisation allocated by the TEC (transport policy, trans-European networks) harmonisation of the internal market (*cf*. law governing the award of contracts) | Exclusive legislative power for railways, at least those in which the Federation holds a majority interest<br><br>Concurrent legislative power for railways owned by the *Länder* or in private ownership | Legislative power in so far as the Federation has not introduced any regulations or no need for federal legislation applies | |
| Postal services | Concurrent legislative powers within the scope of authorisation allocated by the TEC (in particular harmonisation of the internal market) | Legislative power as far as universal services are not concerned; Concurrent legislative power as far as universal services are concerned | Concurrent legislative power as far as legislative services are concerned | |

| Policy Area / Public Service | EU level[1] | Federal level | *Länder* level | Municipal level[2] |
|---|---|---|---|---|
| Pre-school education | EC possesses only supplementary powers to effect promotional measures in the educational/ cultural area (ban on harmonisation or approximation of laws and administrative regulations of the member states) | Concurrent legislation for public welfare (*e.g.* protection of children and young persons) | Legislative power in so far as the Federation has not introduced any regulations or no need for federal legislation applies | |
| Primary and secondary education | EC possesses only supplementary powers to effect promotional measures in the educational/ cultural area (see above) | Legislative power for foreign schools only | Exclusive legislative power in so far as the Federation does not possess competence | |
| Vocational and technical education | EC possesses only supplementary powers to effect promotional measures in the educational/ cultural area (but also: harmonisation of the internal market, *e.g.* recognition of diplomas (see above) | Concurrent legislative powers for labour law | Legislative power in so far as the Federation has not introduced any regulations or no need for federal legislation applies | |
| Tertiary education | EC possesses only supplementary powers to effect promotional measures in the educational/ cultural area (but also: harmonisation of the internal market, *e.g.* recognition of diplomas (see above) | Legislative power for framework legislation | Legislative competence for elaboration of the framework law | |
| Adult education | EC possesses only supplementary powers to effect promotional measures in the educational/ cultural area (see above) | Regulation of training for own administrative personnel<br><br>Concurrent legislative powers for labour law | Legislative power for remaining areas | |
| Hospitals | | Concurrent legislative powers for certain areas (economic safeguarding of hospitals and hospital per diem charges) | Legislative power for all other areas (*e.g.* personnel structure, doctors' fees) which do not fall under local self-government | Authority for personnel and organisation regarding hospitals run by the municipality |

| Policy Area / Public Service | EU level[1] | Federal level | *Länder* level | Municipal level[2] |
|---|---|---|---|---|
| Other health care | Supplementary powers of EC within the scope of authorisation conferred by the TEC (strictly limited; ban on harmonisation of laws and administrative regulations of the member states) | Concurrent legislative powers in some areas (protective measures against infectious diseases and diseases which are a threat to the general public, admission to practice in the healing/medical profession, dealing with medicines and poisons) | Legislative power for the remaining areas | |
| Old age care | | The Federal Constitutional Court is to rule on whether the federal government possesses legislative power on 24 October this year | | |
| Social insurance | Concurrent powers for measures relating to social security – limited to workers | Concurrent legislative powers | Legislative power in so far as the Federation has not introduced any regulations or no need for federal legislation applies | |
| Housing | | Concurrent legislation for control of housing, promotion of housing construction and subsidised housing | Legislative power in so far as the Federation has not introduced any regulations or no need for federal legislation applies; legislative power for building law | Regulation of provision of housing at local level within the available legal scope via by-laws |
| Urban planning | EC-competence only for environmental policy. Only within this framework are there powers for measures concerning regional planning and land use | Concurrent legislative powers for town and country planning<br><br>Competence for framework legislation for general urban development planning (regional planning) | Legislative competence for elaboration of the Federation's framework law on regional planning | Regulation of local town and country planning in the municipal area via by-laws (drafting of zoning and town and country development plans) |
| Food safety | Concurrent legislative powers within the scope of authorisation allocated by the TEC (in the area of common agricultural policy, consumer protection and health policy) | Concurrent legislative powers | Legislative power in so far as the Federation has not introduced any regulations or no need for federal legislation applies | |

| Policy Area / Public Service | EU level[1] | Federal level | *Länder* level | Municipal level[2] |
|---|---|---|---|---|
| Health and safety at work | Concurrent legislative powers within the scope of authorisation allocated by the TEC (in the area of social policy) | Concurrent legislative powers for safety at work and for those areas of the health system assigned to the Federation | Legislative power in so far as the Federation has not introduced any regulations or no need for federal legislation applies | |
| Waste disposal | Concurrent legislative powers within the scope of authorisation allocated by the TEC (environ-mental policy) | Concurrent legislative powers | Legislative power in so far as the Federation has not introduced any regulations or no need for federal legislation applies | Regulation and organisation of local waste disposal in the municipal area |
| Environmental protection | Concurrent legislative powers within the scope of authorisation allocated by the TEC (environ-mental policy | Legislative power for framework legislation in the area of nature conservation and rural conservation<br><br>Concurrent legislative powers for individual key areas of environmental protection (waste disposal, air pollution control, noise abatement, crop protection | Legislative competence for elaboration of the Federation's framework law on nature conservation<br><br>Legislative power in so far as the Federation has not introduced any regulations or no need for federal legislation applies | Promotion of the environment in the municipal area |
| Culture | EC possesses only supplementary powers to effect promotional measures in the educational/ cultural area (ban on harmonisation or approximation of laws and administrative regulations of the member states) | Legislative powers in individual selected areas, in particular:<br><br>Exclusive legislative power for cultural policy abroad,<br><br>exclusive legislative power for matters relating to representation of the state as a whole<br><br>Legislative power for framework legislation to prevent the outflow of cultural assets from the country | Legislative power in so far as the Federation is not competent<br><br>Legislative competence for elaboration of the law to prevent the outflow of cultural assets from the country | Regulation of the use of municipal cultural establishments at local level |

| Policy Area / Public Service | EU level[1] | Federal level | *Länder* level | Municipal level[2] |
|---|---|---|---|---|
| Farming | Concurrent legislative powers within the scope of authorisation allocated by the TEC (Common Agricultural Policy) | Concurrent legislation for individual areas (promotion of agricultural production, safeguarding of food supply, import and export of agricultural produce) | Legislative competence in so far as the Federation is not competent, has not issued any regulations despite being competent or no need for federal legislation applies | |
| Forestry | Concurrent legislative powers within the scope of authorisation allocated by the TEC (Common Agricultural Policy) | Concurrent legislation for individual areas (promotion of forestry production, import and export of forestry products) | Legislative competence in so far as the Federation is not competent, has not issued any regulations despite being competent or no need for federal legislation applies | |
| Tourism | Co-operation of Member States in the Consultative Committee of the EC | Concurrent legislation for travel law | Legislative competence in so far as the Federation is not competent, has not issued any regulations despite being competent or no need for federal legislation applies | Promotion of tourism at local level |
| Media | Concurrent legislative powers within the scope of authorisation allocated by the TEC (cross-border broad casting = service; element of the common market) | Exclusive legislative power for broadcasting facilities and the transmission of broadcasts abroad<br><br>Concurrent legislative power for business law<br><br>Legislative power for framework legislation relating to the general legal status of the press | Legislative power for the other areas<br><br>Legislative power for elaboration of the framework law | |

ANNEX 2. **INDEPENDENT REGULATORY AUTHORITIES**

| Name of regulator | Laws[1] and other rules | Institutional and legal status | Sectors under the regulators authority | Tasks | Powers | Selection of chief executives (presidents and vice presidents)[2] | Accountability mechanisms | Resources / funding and staff |
|---|---|---|---|---|---|---|---|---|
| **Bundeskartell-amt** (BKartA) – *Federal Cartel Office*<br><br>Established 1958 | Act Against Restraints on Competition (GWB)<br><br>Rules of Procedure, to be confirmed by Federal Ministry of Economics and Labour | Independent higher federal authority within the scope of business of the Federal Ministry of Economics and Labour | All sectors with some exemptions and special provisions for specific sectors | Proceedings against all restraints of competition including enforcement of the ban on cartels, merger control and control of abusive practices | Administration, supervision, advice | Appointment of president and vice-president by Federal President after being nominated by the Minister of Economics and Labour | Biannual activity reports to be submitted to Parliament, leaflets on specific issues, press releases | Federal Budget, Fees; staff: 270 |

1. All federal authorities are subject to the Act on Administrative Procedures (Verwaltungsverfahrensgesetz – VwVfG).

2. As a rule, independent higher federal authorities are headed by a president and a vice-president (RegTP two vice-presidents). Presidents and vice-presidents are appointed for five years with an option of prolongation

| Name of regulator | Laws and other rules | Institutional and legal status | Sectors under the regulators authority | Tasks | Powers | Selection of chief executives (presidents and vice presidents) | Accountability mechanisms | Resources / funding and staff |
|---|---|---|---|---|---|---|---|---|
| **Regulierungsbehörde für Post und Telekommunikation** (RegTP) – *Regulatory Authority for Telecommunications and Posts* Established 1998 | Telecommunications Act (TKG), Postal Act (PostG) Rules of Procedure, to be confirmed by Federal Ministry of Economics and Labour | Independent higher federal authority within the scope of business of the Federal Ministry of Economics and Labour | Telecommunications, postal services | Supervision and licensing of postal and telecommunications service providers; impose *ex ante* obligations for providers with a dominant market position; impose or prohibit a certain conduct in relation to a company that abuses its dominant market position | Supervision, administration, adjudication | Appointment of president and vice-presidents by Federal President after being nominated by the Federal Government on the basis of a non-binding proposal by the Beirat | Biannual activity reports to Parliament, annual reports, RegTP Gazette, leaflets on specific issues, press releases | Fees, fines. contributions and appropriation (part of general budget); staff: 2 260 |
| **Bundesanstalt für Finanzdienstleistungsaufsicht** (BAFin) – *Federal Financial Supervisory Authority* Established 2002 by merging the three previous supervisory offices | Act on Integrated Financial Services Supervision (FinDAG) Ordinance of the BAFin Rules of Procedure, to be confirmed by Federal Ministry of Finance | Federal institution under public law with legal capacity belonging to the scope of business of the Federal Ministry of Finance. | Banking, insurance and securities/asset management | Supervision of the financial industry with a view to safeguard the solvency of banks, financial services institutions and insurance undertakings | Supervision, administration, rule-making | Appointment of president and vice-president by Federal President after being nominated by the Minister of Finance | Annual reports, press releases; Guidelines to be published in the Federal Gazette | Fees, charges and apportionment of costs to industry; staff: 1 000 |

| Name of regulator | Laws and other rules | Institutional and legal status | Sectors under the regulators authority | Tasks | Powers | Selection of chief executives (presidents and vice presidents) | Accountability mechanisms | Resources / funding and staff |
|---|---|---|---|---|---|---|---|---|
| **Regulator for the Electricity and Gas Market** | Government decision to establish an independent regulator for the electricity and gas markets by 1 July 2004 was announced in March 2003. Follows EU-Directives on common rules for the internal market in electricity and gas and on conditions for access to the network for cross-border exchanges in electricity | Yet to be decided | Electricity and gas | Regulation of cost calculation methods and network access conditions for electricity and gas, network congestion management | | | | |
| **Bundesinstitut für Arzneimittel und Medizin-produkte** (BfArM) – *Federal Institute for Drugs and Medical Devices* Established 1994 | Drug Act (AMG) Rules of Procedure | Independent higher federal authority within the scope of business of the Federal Ministry of Health and Social Security | Pharmaceuticals, medicinal products | Authorisation of finished medicinal products (except for animals), registration of homeopathic drugs; monitoring of risks due to medicinal products; supervision of the legal traffic in narcotic drugs and precursors | Administration, supervision, advice | Appointment of president and vice-president by Federal President after being nominated by the Minister of Health and Social Security | Press releases | Fees, federal budget; staff 1 100 |

| Name of regulator | Laws and other rules | Institutional and legal status | Sectors under the regulators authority | Tasks | Powers | Selection of chief executives (presidents and vice presidents) | Accountability mechanisms | Resources / funding and staff |
|---|---|---|---|---|---|---|---|---|
| **Eisenbahnbundesamt** (EBA) – *Federal Railway Authority* Established 1994 | General Railways Act (AEG) Rules of Procedure | Independent higher federal authority within the scope of business of the Federal Ministry of Transport, Building and Housing | Federal railways, railway service operators and infrastructure providers | Supervision and licensing for federal railways and railway service operators domiciled abroad for the territory of the Federal Republic of Germany | Administration, supervision | Appointment of president and vice-president by Federal President after being nominated by the Minister of Transport, Building and Housing | Press releases, EBA-Newsletter | Fees and charges, federal budget; staff: 1 200 |
| **Bundesversicherungsamt** (BVA) – *Federal (Social) Insurance Authority* Established 1956 | Social Insurance Code (SGB) Rules of Procedure | Independent higher federal authority within the scope of business of the Federal Ministry of Health and Social Security | Directly dependent[3] social insurance institutions and other specific establishments | Supervision of directly dependent social insurance institutions and other specific establishments | Advice, supervision, administration | Appointment of president and vice-president by Federal President after being nominated by the Minister of Health and Social Security | Annual activity report | Federal budget; staff: 500 |
| **Bundesamt für Verbraucherschutz und Lebensmittelsicherheit** (BVL) – *Federal Office for Consumer Protection and Food Safety* Established 2002 | Drug Act (AMG) | Independent higher federal authority within the scope of business of the Federal Ministry of Consumer Protection, Nutrition and Agriculture | Pharmaceutical industry | Authorization and registration of drugs for animals | Supervision, administration | Appointment of president and vice-president by Federal President after being nominated by the Minister of Consumer Protection, Nutrition and Agriculture | | Fees, federal budget, staff: 270 |

3. Social insurance institutions extending across more than three *Länder*.

## NOTES

1. Pollit & Bouckaert (2000).

2. Eberlein and Grande (2000).

3. *Op. cit.*

4. Wollmann (2000).

5. The KGSt (*Kommunale Gemeinschaftsstelle für Verwaltungsvereinfachung*) is an independent consultancy organised by a voluntary membership of municipalities, counties and local authorities with more than 10 000 inhabitants.

6. See for example Röber and Löffler (1999).

7. Wollmann (2000).

8. See also Part I of this report.

9. For example, the Advisory Council included suggestions to establish a ministerial "declaration of guarantee" that scrutiny of proposed legislation had taken place; it also promoted the idea to advance the use of practical tests of draft regulations (*i.e.* pilot projects with civil servants working under the prescriptions of the proposed law); to review, speed up and to the extent possible reduce the number of administrative functions in the entire federal administration (an interim report mapped a total of 2 167 separate federal administrative functions); and to repeal a number of specifically identified reporting obligations (Metz, 1998).

10. OECD (2002*a*).

11. The Checklist was made available to government officials as a guideline. As was the case for most early "checklists" of this kind in OECD countries, compliance with the guidelines were not monitored or sanctioned. The checklist included the following questions 1) Is action at all necessary? 2) What are the alternatives? 3) Is action required at federal level? 4) Is a new law needed? 5) Is immediate action required? 6) Does the scope of the provision need to be as wide as intended? 7) Can the length of the period for which it is to remain in force be limited? 8) Is the provision unbureaucratic and understandable? 9) Is the provision practicable? 10) Is there an acceptable cost-benefit relationship?

12. The German Bundestag (2003).

13. State elections are held during the federal parliamentary term. The political composition of the Bundesrat can – and often does – alter during the life of a federal government. Federal government coalition parties often find that they do not have a majority in the *Bundesrat*

14. Wollman (2000). As an exception to this wide scope of administrative responsibilities of local authorities, the delivery of social services has traditionally been carried out, to a considerable extent, by non-public, not-for-profit organisations.

15. State elections are held during the federal parliamentary term. The political composition of the Bundesrat can – and often does – alter during the life of a federal government. Federal Government coalition parties often find that they do not have a majority in the *Bundesrat.*

16. Disagreements between the Federal Government and the Bundestag on the one hand and the Bundesrat on the other on whether new legislation are *Zustimmungsgesetze* or *Einspruchsgesetze* may be submitted to the Federal Constitutional Court in Karlsruhe.

17. *Cf.* Scharpf (1999).

18. OECD (2003b).

19. Kretschmer (2002).

20. The recommendations of the presidents explicitly mention the use of the Federal Governments' checklist questions in case there is no *Land*-specific questionnaire.

21. Landtags-Drucksache Rheinland-Pfalz 13/3172.

22. *Cf.* dpa and ddp press releases 080703.

23. Source: Communication with the government of Germany.

24. Internal Market Scoreboard published 5 May 2003. The Implementation deficit is the percentage of EU Directives which have not been written into national law after the deadline for doing so has passed.

25. The interests of foreign stakeholders are generally expressed through professional associations. It is assumed that business organisations like the Federal Association of German Industry (BDI) adequately represent foreign companies' interests since there is no formal distinction between domestic and foreign entities, *cf.* Regulatory Reform in Germany, Chapter 4: Enhancing Market Openness through Regulatory Reform, TD/TC/WP(2003)19.

26. For example, one ministry, upon listing "relevant regulations", states that it can take "no responsibility for accuracy, actuality, or comprehensiveness of the listed regulations".

27. See OECD (2000), *Reducing the Risk of Policy Failure: Challenges for Regulatory Compliance*, Paris.

28. In the ***Netherlands,*** "The Table of Eleven" is used both to guide reviews of compliance and enforcement relating to existing legislation and as an analytical tool in the development of new regulation. The table is in three parts: s*pontaneous compliance dimensions*, *control dimensions* and *sanctions dimensions*. This "checklist" approach can help regulators consider compliance issues in a detailed, systematic fashion, and also provide a useful review and quality control tool, *Cf.* OECD (1999). In the ***United Kingdom***, government policy and guidance on the preparation of regulations include explicit considerations on securing compliance. Policy makers are encouraged to consider a variety of compliance factors, including taking a balanced approach between high compliance and (over-) active enforcement, *cf*. OECD (2001*b).* In ***Canada***, implementation and compliance strategies are also required to be explicitly and publicly discussed as part of the preparation of a regulatory proposal, *cf.* OECD (2002b).

29. In a similar vein, within the *Länder* administration, the allocation of administrative functions has been particularly shaped by the use of local authorities as agents for implementing Land regulation. As a consequence, the counties (Landkreise) have served as the bottom line administrative level and administrative work-horses of Land administration, implementing 75% or more of federal and *Länder* legislation and handle two-thirds of public capital expenditures (Schröter and Wollman, 1997, Wollmann, 2000).

30. When the *Länder* implement a federal law as a matter of their own concern, federal supervision is restricted in accordance with Article 84 (3), sentence 1 of the Basic Law to verifying the legality of enforcing the law. If a violation of a right applies, after establishing a flaw the Federal Government will call on the Land to eradicate the said flaw. Should this request go unheeded, the Federal Government must first of all appeal to the Bundesrat for a formal declaration that enforcement of the law is subject to flaws (formal complaint). Only if the Land still fails to take action after this formal declaration is the Federal Government able to appeal to the Federal Constitutional Court in accordance with Article 93 (1), no. 3 of the Basic Law in conjunction with Section 13, no. 7 of the law on the Federal Constitutional Law or to carry out federal enforcement pursuant to Art. 37 of the Basic Law with the consent of the Bundesrat. The measures are subject to the discretionary powers of the Federal Government, which are limited by the obligation to avoid excessive measures. If the Bundesrat refuses to formally recognise the existence of a flaw, enforcement action is not admissible. In this case, the only option remaining to the Federal Government is to appeal to the Federal Constitutional Court in accordance with Art. 84 (4), sentence 2 of the Basic Law (Source: Government of Germany, answers to review questionnaire).

31. 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.

32. Constitutional complaints are usually directed against rulings by the competent court of last instance, thereby enabling the Federal Constitutional Court to rule in a more indirect manner on the constitutionality of the rule of law to be applied in the action concerned. The constitutional complaint is the most commonly employed means of recourse to the Federal Constitutional Court. In the abstract judicial review process, the Federal Constitutional Court adjudicates in cases involving differences of opinion or doubts with regard to the formal and substantive compatibility of federal law or Land law with the Basic Law or the compatibility of Land law with other federal law on application from the Federal Government, a Land government or one third of the members of the Bundestag. The process is intended to provide objective constitutional monitoring of the legislature. The abstract judicial review process has given rise to important and politically controversial explosive rulings by the Federal Constitutional Court. In the period from 7 September 1951 to 31 December 2000, the Federal Constitutional Court ruled on 81 abstract judicial review proceedings. The regulations pertaining to concrete judicial review oblige the courts to suspend proceedings and to obtain a ruling from the Federal Constitutional Court if they consider a law whose validity is vital to their own ruling to be in contravention of the Basic Law. The concrete judicial review is the second most common form of recourse to the Federal Constitution Court, after the constitutional complaint.

33. Government of Germany, answer to the OECD Regulatory Reform Review questionnaire.

34. This section on the use of regulatory alternatives in the environmental area is based on OECD (2001a).

35. In 1995 German industry declared that it would “make special efforts on a voluntary basis to reduce its specific $CO_2$ emissions and its specific energy consumption by up to 20% by the year 2005 (base 1987)”. This general undertaking was based on declarations from a total of 19 industrial and energy supply associations which had formulated different targets in individual declarations. The offer was linked to the expectation that the Government would consequently forgo “compulsory measures”. In November 2000, the declaration was transformed into a more formal agreement between industry and the Federal Government on reducing specific emissions of $CO_2$ (-28% by 2005); and of all six Kyoto GHGs (-35% by 2012).

36. The key elements of this agreement was formalised in the April 2002 "Act on a regulated end to the use of nuclear energy for commercial generation of electricity".

37. A system of 230 independent auditors has been established, supervised by an accreditation and licensing body (DAU). EMAS sites are registered by chambers of industry and commerce or chambers of crafts (for small enterprises).

38. According to Heilberufegesetz Nordrhein-Westfalen (Act on Medical Professions of Northrhine-Westfalia).

39. OECD (1997*b*), Paris.

40. *Joint Rules of Procedure* for the Federal Ministries §§ 42, 43, 44 and 62.

41. Broken down for each financial year in the Federation's multiyear financial planning stating whether and if so, to what extent, the revenue or cost effects are taken into account and how they can be compensated for.

42. OECD (1997), p. 221.

43. OECD (2003c).

44. The decision-making process of the Bundeskartellamt, for example, is strongly influenced by an internal court-like structure, which vests almost all powers in so called decision-making units. Decisions on mergers, cartels and abusive practices are made by the decision divisions of the Bundeskartellamt, which are organised according to sectors of the economy. Each case is decided upon by a collegiate body consisting of a chairman and two other members. They must reach a majority decision. The decision-making units do not receive instructions from other bodies and make their decisions independently. The only official mode of ministerial interference is the ministerial permission, which supersedes the cartel office's decision in cases of merger and cartel control. The *Ministererlaubnis* allows the minister to invoke other policy concerns and criteria than those applied by the cartel office under the competition law. This instrument has not been used very often over the last 10 years although there are increasing signs of resort to it. RegTP's decision making process is also strongly influenced by an internal court-like structure, which vests almost all powers in so called decision-making units. These units are organised according to subject areas.

45. For example, RegTP's possible activities to exercise and ensure financial transparency, rate approval, interconnection control, and access depend on a finding of dominance, the definition and ascertainment of which is with the Bundeskartellamt. The Bundeskartellamt also has an opportunity to comment on RegTP proceedings about charges, network access, and abuse, and RegTP has similar rights in BKA proceedings. Co-ordination between the two is extensive. The Bundeskartellamt was involved in about 100 matters at the RegTP in 1999-2000.

46. RegSG – Regulierungsbehörde für Strom und Gas. The name was chosen as a matter of convenience. No recommendations or suggestions are implied.

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

48. Government of Germany (2003).

49. Joint Rules of Procedure of the Federal Ministries, Sections 43 (1) no 6 and Section 44 (6).

50. Other examples of such reporting obligations which may include reviews of existing regulations are: the Environmental Information Act which obliges the Federal Government to publish a report on the state of the environment at quarterly intervals; the Act for Promoting Closed Substance Cycle Waste Management and Ensuring Environmentally Compatible Waste Disposal which obliges the *Länder* to inform the public on progress and forecasts on waste management; the Renewable Energy Act which requires bi-annual

reports to be submitted to the Bundestag on progress in introducing plants for generating electricity from renewable energy sources onto the market and the attendant cost trends and, where appropriate, proposals are to be submitted for adjustment of the minimum allowances.

51. Schröter and Wollman (1997).

52. Referat VIII A7 (Bürokratieabbau).

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