

Chapter 2

Institutional capacities for Better Regulation

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

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

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

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

Assessment and recommendations

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

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

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

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

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

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

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

Box 2.1. Recommendation from the 2004 OECD report

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

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

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

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

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

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

Box 2.2. Recommendation from the 2004 OECD report

Select a permanent ministerial committee responsible for promoting regulatory policy.

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

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

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

Box 2.3. Recommendation from the 2004 OECD report

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

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

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

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

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

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

Background

Germany's public governance context

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

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

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

The executive

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

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

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

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

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

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

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

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

The legislature at the federal level

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

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

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

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

The federal president

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

The judiciary

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

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

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

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

Regulatory agencies

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

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

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

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

Notes

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

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

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

Developments in the public governance context

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

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

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

Box 2.5. German federal reforms

The Federalism Reform I (modernisation of the federal system)

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

Key reform measures included the following:

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

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

The Federalism Reform II (federal/land financial relations)

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

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

Länder involvement

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

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

Developments in German Better Regulation institutions

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

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

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

Key institutional players for Better Regulation policy at the federal level

The executive centre of government

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

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

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

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

Chancellery Better Regulation Unit

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

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

National Regulatory Control Council

The National Regulatory Control Council (*Normenkontrollrat, NRCC*) was set up to be an independent advisory and control body external to the executive. The establishment of the *NRCC* was agreed by the CDU, CSU and the SPD in the coalition agreement of 2005 and ratified by law in August 2006.³ The *NRCC*'s mandate is to support the federal government in reducing administrative burdens found in federal legislation. Its mandate requires it to focus exclusively on administrative costs. Its scrutiny therefore does not cover substantive compliance costs, direct financial costs, or so-called “irritating” burdens (burdens which irritate business but which are not necessarily captured by the SCM methodology). The *NRCC* is, in particular, involved in the preparatory phase of law drafting, before proposals are presented to the federal Cabinet for decision. If requested, the *NRCC* also intervenes during the decision-making process, and may advise the committees of the *Bundestag*. Its mandate covers the following:

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

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

Institutional support for e-Government strategy

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

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

Federal Government Commissioner for Information Technology

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

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

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

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

Chief Information Officers

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

IT Council and IT Steering Group

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

Co-ordination on Better Regulation across the federal government

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

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

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

Better Regulation and regulatory agencies

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

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

Better Regulation and the legislature

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

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

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

Box 2.7. Impact assessment and the federal parliament

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

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

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

Better Regulation and the judiciary

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

Other important players

The German Court of Audit

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

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

Resources and training

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

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

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

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

Notes

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