Executive Summary - Germany

Economic context and drivers of Better Regulation

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

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

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

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

Public governance context for Better Regulation

As in other OECD countries, regulatory management is heavily influenced by constitutional and public governance structures and traditions. In Germany's case, these are important assets which have successfully secured stability and a deeply rooted respect for the law. At the same time, the system poses significant challenges for moving forward speedily, for the promotion of a strong collective view of reform needs, and for the emergence of an approach that positions Better Regulation as something much more than the assurance of legal quality. The legal state (*Rechtstaat)* tradition confers a very positive respect for the law, but it also tends to hold back innovation and the development of a broader view of regulatory quality. Ministerial autonomy within the federal executive poses challenges for the development of a collective view. Not least, Germany's federal system, which gives the *Länder* a crucial role not only in respect of their own areas of competence as states in their own right, but also in the implementation of federal legislation, makes for a complex environment in which to take decisions. Two important reforms of the federal system of governance are underway, aimed at providing a more effective backdrop for reform efforts and addressing aspects of the system which slow up change. Box 0.1 outlines the main features of the German federal system.

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

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

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

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

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

The reform has helped improve federal and *Land* authorities' ability to act and make decisions, and assign political responsibilities more clearly. It has helped expedite the legislative procedure and improve its transparency. It has helped increase the expediency and efficiency of the legislative procedure. An important effect is that the number of laws requiring the consent of the *Bundesrat* was reduced. Between September 2006 and February 2009, 39% of laws required the consent of the

Bundesrat, compared to 53% before the reform. The *Länder* have made use of their new competences. They may enact laws at variance with federal legislation with respect to substantive matters, in accordance with Art. 72 (3) of the Basic Law. In accordance with Art. 84 of the Basic Law, the *Länder* may enact deviating regulations concerning the administrative procedure and the establishment of requisite authorities. As of July 2009: Art. 72 (3) of the Basic Law was used by two *Länder* on two occasions (for matters related to hunting); Art. 84 (1) (2) was used on two occasions (social legislation).

Legislative competences

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

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

Administrative (implementation) competences

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

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

The 2006 federal reform has had an important effect on the capacity of the *Länder* to self-organise. The abolition of framework legislation and the creation of the right to deviate from federal provisions have strengthened their organisational sovereignty. Generally, the *Länder* are responsible for the establishment of authorities and the regulation of administrative procedures. Even if a regulation is adopted at the federal level in this area, the *Länder* are now entitled to adopt their own regulations, in derogation of federal law. Any statutory exclusion of this possibility of deviation on the part of the

Länder, which would require the consent of the *Bundesrat*, is now only permissible in exceptional cases involving a special need for uniform nationwide regulation. Such a need exists, for example, in the case of procedural environmental law.

Developments in Better Regulation and main findings of this review

Strategy and policies for Better Regulation

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

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

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

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

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

The scope of Better Regulation processes remains somewhat narrow, and the administrative burden reduction programme appears to have absorbed a large part of

the political impetus. The agenda leans disproportionately towards the measurement (and reduction) of costs, leaving the analysis of benefits in the background. At the same time, *ex ante* impact assessment needs to be strengthened. The development of a sustainability dimension provides an opportunity to do this. Communication has so far been largely limited to the administrative burden reduction programme. The government's recent annual report on the administrative burden reduction programme has been the main specific communication related to Better Regulation available to the general public. Communication on overall Better Regulation strategy and policies is not evident, beyond the fact that is referenced in the coalition agreements. This leaves stakeholders (inside and outside the administration) short of a clear picture of what is being achieved, and how it helps broader policy objectives.

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

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

Institutional capacities for Better Regulation

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

These developments are important in terms of counteracting the centrifugal forces at work in the German context, set against the tradition of silo ministries, an inward looking administration, and a weak centre. The new chancellery units have active advocacy, management and evaluation responsibilities. The establishment of the *NRCC* as an independent watchdog is equally striking in the context of German institutional tradition.

An important feature of the *NRCC* is that its mandate transcends the political cycle. Institutional structures for supporting Better Regulation nevertheless remain disconnected. There is an increasingly urgent need to consolidate the new approach, with further institutional development to strengthen the coherence and clarity of Better Regulation management (not only for those inside the administration but also for external stakeholders), and to fully secure its sustainability over political cycles. A "networked" approach to institutional management of Better Regulation is being tested across several EU countries with some success, and for the same reasons as in Germany (to fit with existing public governance traditions). But such an approach is not a soft option, still relies on some form of visible flagship unit, and needs careful development.

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

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

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

The federal parliament is an important player beyond the executive and has played a positive role in the emergence of the administrative burden reduction

programme. The parliament has also been an active participant in legislative simplification. Finally, it has a fast growing interest in sustainability issues, through the Parliamentary Advisory Council on Sustainable Development. As in some other European countries this suggests that the parliament is taking a growing interest in Better Regulation.

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

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

Transparency through consultation and communication

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

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

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

The approach, however, falls short of a fully effective, modern and inclusive public consultation system. The issues raised by the 2004 OECD report remain largely valid. The two most important issues are the lack of transparency and the fact those outside the established system have little if any opportunity for their voices to be heard. This increases the risk of bias and capture in interpreting the results. The exclusion of stakeholders who are not part of the traditional system is likely to stifle innovative ideas and miss useful inputs. It also puts citizens and individual businesses at arm's length from the administration, which is unhelpful to the task of building a constituency in support of Better Regulation.

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

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

The development of new regulations

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

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

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

Strong traditions also act as a brake on the development of new approaches. An underlying structural problem common to many European countries, including Germany, is

that longstanding administrative procedures and legal quality control mechanisms tend to be used, for example, as the basis for the development of impact assessment processes, even if they are not very well suited to this role. There is no fundamental re-engineering of underlying requirements to make room for a new approach.

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

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

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

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

The management and rationalisation of existing regulation

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

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

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

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

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

evaluation of the programme so far in order to set the scene for further development would be helpful.

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

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

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

Compliance, enforcement, appeals

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

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

As might be expected in a system that is strongly framed by the rule of law, a range of appeal processes are available. The constitution and the Administrative Procedures Act set out general obligations for the authorities to consult with affected parties, and to inform affected parties or the general public about administrative decisions. The main appeal options for citizens and businesses are internal review, court action and (for citizens only) constitutional challenge. The principle of judicial review is a major element of the German tradition. The judicial system is reported to work smoothly although there can be some delays at tribunals due to budget or staff constraints. Initiatives such as

the citizen phone contact point support accessibility. The aim is to facilitate the delivery of administrative services, helping citizens to understand the "who's who" and "who does what" in the federal public administration.

The interface between member states and the European Union

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

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

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

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

The interface between subnational and national levels of government

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

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

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

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

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

Key recommendations

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

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

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

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

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

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

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

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

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

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

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

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

Note

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