Regulatory Reflorm in Germany: Enhancing Market Openness through Regulatory Reform

Peter Walkenhorst and Roya Ghafele

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REGULATORY REFORM IN GERMANY

ENHANCING MARKET OPENNESS THROUGH REGULATORY REFORM

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FOREWORD

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

This report on *Enhancing Market Openness through Regulatory Reform* analyses the institutional set-up and use of policy instruments in Germany. It also includes the country-specific policy recommendations developed by the OECD during the review process.

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

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

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

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

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ACRONYMS

ACP	African, Caribbean and Pacific countries
ATLAS	Automatisiertes Tarif- und Lokales Zoll- Abwicklungs-System (Automated Tariffs- and Local Customs System)
BDI	Bundesverband der Deutschen Industrie (Federal Association of German Industry)
BKA	Bundeskartellamt (Federal Cartel Office)
BEST	Business Environment Simplification Task Force
CEN	European Commission for Standardisation
CENELEC	European Committee for Electrotechnical Standards
DAR	Deutscher Akkreditierungsrat (German Council for Accreditation)
DIN	Deutsches Institut für Normung (German Institute for Standardisation)
DITR	Informationszentrum für Technische Regeln (Information Centre for Technical Regulation)
DKE	Deutsche Kommission Elektrotechnik, Elektronik, Informationstechnik (German Committee for Electronical, Electronic and Information Technologies)
DtA	Deutsche Ausgleichsbank
DQS	Deutsche Gesellschaft zur Zertifizierung von Managementsystemen (German Society for the Certification of Management Systems)
EA	European Co-operation for Accreditation
ECA	European Competition Authorities
EFTA	European Free Trade Agreement
ETSI	European Telecommunications Standardization Institute
FDI	Foreign Direct Investment
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GWB	Gesetz gegen Wettbewerbsbeschränkung (Act against Restraints on Competition)
GPA	Government Procurement Agreement
IAF	International Accreditation Forum
ICIS	Integrated Customs Information System
IEA	International Energy Agency
IEC	International Electrotechnical Commission
IIC	Industrial Investment Council
ILAC	International Laboratory Accreditation Co-operation
IRG	Independent Regulators' Group
ISO	International Standardisation Organisation
ITU	International Telecommunication Union
MFN	Most Favoured Nation
MRA	Mutual Recognition Agreement
NSO	National Standardisation Organisation
PostG	Postgesetz (Postal Act)
RegTP	Regulierungsbehörde für Telekommunikation und Post (Regulatory Authority for Telecommunications and Posts)
RIA	Regulatory Impact Analysis
SLIM	Simpler Legislation for the Internal Market
SME	Small and Medium Sized Enterprise
SPS	Agreement on the Application of Sanitary and Phytosanitary Measures
TBT	Agreement on Technical Barriers to Trade
TKG	Telekommunikationsgesetz (Telecommunications Act)
UN-ECE	United Nations Economic Commission for Europe
VDA	Verband der Automobilindustrie (Association of the Automobile Industry)
VDE	Verband der Elektrotechnik, Elektronik und Informationstechnik (Association for Electronical, Electronic and Information Technologies)
VDEW	Verband der Elektrizitätswirtschaft (Association of the Electricity Industry)
VgRÄG	Vergaberechtsänderungsgesetz (Amendment to Public Procurement Law)
VOB	Verdingungsordnung für Bauleistungen (General Terms and Conditions Applicable to Contracts in Construction)
VOL	Verdingungsordnung für Leistungen ausgenommen Bauleistungen (General Terms and Conditions Applicable to Contracts in Services except for Services in Construction)
VOF	Verdingungsordnung für freiberufliche Leistungen (General Terms and Conditions Applicable to Contracts for Freelance Services)
ZORA	Zentralstelle Risikoanalyse Zoll (Central Customs Office for Risk Analysis)

SUMMARY

This report assesses the impact of regulations and the regulatory process in Germany on trade and investment, as well as the extent to which market openness considerations are incorporated into the general policy framework for regulations. The assessment is based on six efficient regulation principles developed by the OECD, namely: transparency, non-discrimination; avoidance of unnecessary trade restrictiveness; use of internationally harmonized standards; streamlining conformity assessment; and integration of competition principles into the regulatory framework.

Through broad application of the six efficient regulation principles Germany has been very successful in establishing a regulatory framework that has competently underpinned German participation international competition and the global economy. International stakeholders trading with or investing in Germany are confronted with an extensively elaborated regulatory framework of high quality. Particular mention may be made of the important steps taken to facilitate customs procedures, with a positive impact on trade flows. Equally, the country has taken a leading role in contributing to the spread of internationally harmonized standards and the recognition of foreign measures.

The reduction of barriers to trade and investment worldwide has enabled Germany to take advantage of the expanding global market. At the same time a gradually more open market in Germany has provided benefits to consumers and contributed to economic growth and innovation. The progressive liberalisation of the German market has been driven not only by domestic forces, but even more so by regulations that follow from agreements at the regional and international level.

Despite Germany's success in establishing a regulatory system that strongly supports market openness, there remains room for improvement in some areas. The general accessibility of regulatory information permits high levels of transparency; however, the extreme complexity of the legal architecture represents a significant challenge to new market entrants, particularly foreigners. Non-domestic stakeholders may need a substantial amount of time and resources to understand various and occasionally duplicative regulations and institutions applying them. This circumstance is rendered more acute by the exactness with which the regulatory framework is implemented.

In addition, there is room for progress in the area of public procurement, where the country is not profiting from the opportunity of taking a forefront position within the EU which would reflect its economic capacity. Among EU countries Germany has the lowest level of public procurement tenders openly advertised at the European level and does not provide adequate legal protection for bidders competing for tenders below the EU threshold.

In Germany, like in other EU countries, the regulatory processes in areas directly or indirectly affecting trade and investment are initiated at the EU level or directed by decisions of the EU with implementation often taking place at the national level. Reflecting this distribution of responsibilities, there is a tendency at the national level not to consider the full extent of international implications. At the national level the advantages of adopting an international perspective are not yet taken to their full extent. To give an example, regulatory impact assessments do not explicitly address trade and investment related aspects.

The German administration is aware of the need to further change the regulatory framework in order to enhance economic growth. Several promising ongoing reform initiatives address many, if not most, areas covered in this report. The impact and pace of these reforms remains to be seen and evaluated.

1. OVERVIEW OF GERMANY'S ECONOMIC AND POLICY ENVIRONMENT FOR MARKET OPENNESS

The deeper integration of national and international markets as a result of globalisation has reinforced the linkages between domestic and trade policies. As tariff barriers to trade have fallen, the impacts of domestic regulations on international trade and investment have gained in importance. Even regulations that are aimed at promoting domestic policy objectives in areas such as health, safety or the environment may have direct or indirect effects on trade, with possibly adverse impacts on the economy. Hence there is a need for regulations to be designed in a way for them to be consistent with an open trading system and supportive of international competition. This chapter describes and assesses how the German regulatory environment affects the access of foreign firms to the domestic market by means of exports of goods and services or foreign direct investment. Another issue – whether and how inward trade and investment affect the achievement of legitimate non-trade objectives reflected in regulation – is beyond the scope of this review.

The most striking feature of the German economy is its newly gained size. Due to the integration of Eastern Germany it has enhanced its position as the largest market in the EU with a GDP of € 2 269.2 billion in 2001 and a population of 82.3 million people. Germany is the world's third largest economy after the US and Japan and the world's second largest exporter of merchandise products. In 2001 it had a merchandise trade surplus of about € 87 billion, corresponding to approximately 4.5 per cent of GDP, but a deficit in services trade of almost the same magnitude (Table 1).

Yet managing size is a challenge. Since 1990, Germany is confronted with the ongoing need to adjust to the process of unification. To a large extent this is reflected in an average growth rate in GDP of 0.75 per cent during the last decade. It is also expressed in the size of its merchandise trade balance, which dropped sharply after German reunification, as goods were absorbed for investment and consumption in Eastern Germany and recovered only gradually to approach pre-reunification levels in 2001 (Figure 1). As services imports have exceeded exports, the current account became negative throughout the 1990s.

After unification Germany aimed to equalise living standards across the country. Wages and social benefit payments in Eastern Germany were increased, and as a result domestic demand boomed, but at the same time Eastern Germany lost its international competitiveness and fiscal costs rose. Transfers to Eastern Germany, running at 4-5 per cent of GDP since 1991, remain a major burden on public finance and contributed to a government budget deficit of € 25.7 billion in 2001 (OECD, 2002a).

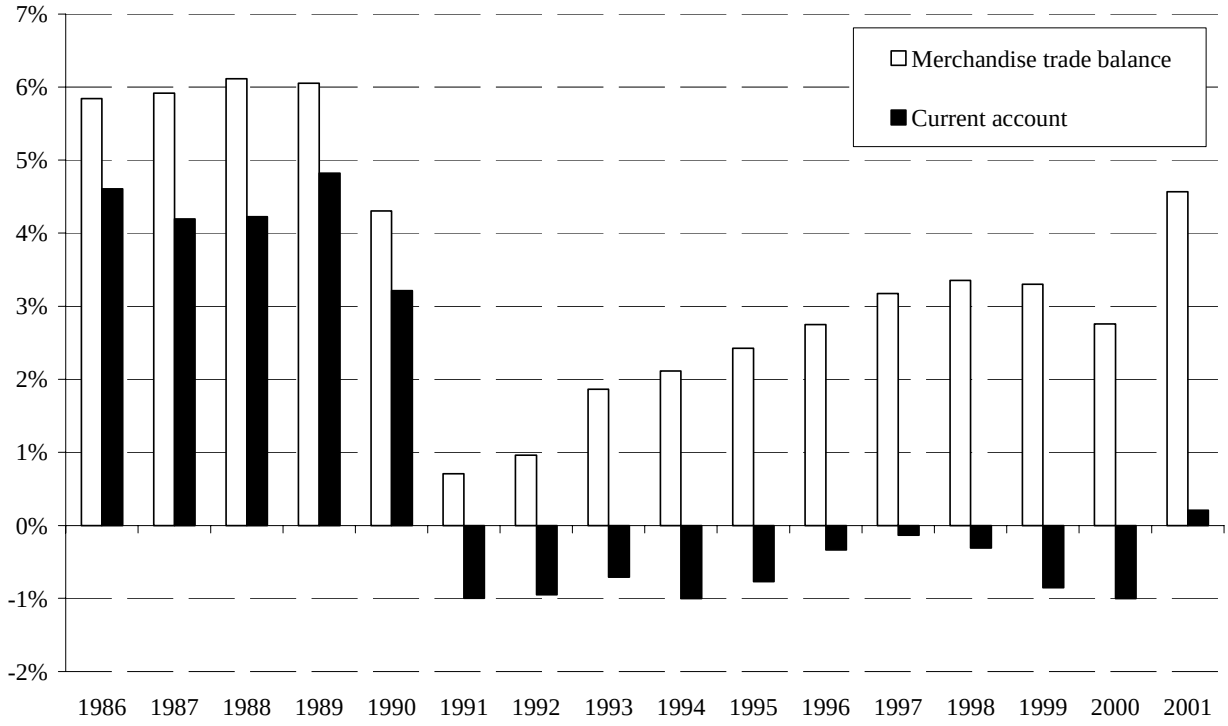
Germany has pursued export-oriented economic policies since World War II and has generally been keen to foster further integration at the European and international levels. Over the past 50 years, Germany has been involved in all major multilateral agreements to lower and remove barriers to trade. Within the EU, it has also been a promoter of an open common external trade policy. International trade agreements have resulted in the lowering of tariffs for manufacturing products, and set trade in services on the path of progressive liberalisation. Moreover, the development of the Single Market has led to the decrease of regulatory barriers to trade within EU countries, and the development of internal market directives has helped to open some key sectors, including telecommunications and energy, to competition.

Table 1: Geographical structure of merchandise trade in Germany, 2001

	Imports (million €)	%	Exports (million €)	%	Balance (million €)
OECD	**432 381**	**78.6**	**522 020**	**81.9**	**89 639**
EU-15	274 374	49.9	342 720	53.8	68 346
Non-EU Europe	78 339	14.2	81 100	12.7	2 761
NAFTA	49 946	9.1	76 895	12.1	26 949
Asia & Pacific	29 721	5.4	21 304	3.3	-8 417
Non-OECD	**96 959**	**17.6**	**99 044**	**15.5**	**2 085**
Europe	19 378	4.0	26 880	4.2	4 745
Africa	11 192	2.0	11 812	1.9	620
America	8 689	1.6	11 144	1.7	2 456
Near & Middle East	5 081	0.9	13 646	2.1	8 565
Asia & Pacific	50 069	9.1	35 561	5.6	-14 508
Unspecified	20 934	3.8	16 269	2.6	-4 664
World	**550 273**	**100.0**	**637 333**	**100.0**	**87 060**

Source: OECD, 2003a.

Figure 1: German merchandise trade balance and current account as a share of GDP



Source: IMF.

The high degree of regional integration is reflected in the fact that about half of all trade is conducted with other members of the EU. Similarly, about half of German investment abroad is undertaken in EU countries and the share of other EU members in all foreign investment in Germany even exceeds 60 per cent (Table 2). Germany is a net FDI exporter and the country's outward investments surpass inward stocks for all major geographical regions, except the Near and Middle East.

FDI inflows into Germany have been relatively low until the mid-1990s and the inward stock of foreign investment relative to GDP was lower than in France and the USA, for example (Figure 2). More recently, FDI inflows have grown faster than in many other countries, helped by some large-scale transactions, such as the takeover of Mannesmann by Vodafone Airtouch. (The value of which corresponded to about nine per cent of Germany's GDP). The ratio of the value of inward FDI to GDP more than tripled during 1995-2000 to reach 24 per cent at the end of that period. This ratio is still lower than corresponding figures in the United Kingdom and Canada, but higher than in the other G-8 countries.

Table 2: Geographical structure of FDI stocks in Germany, 1999

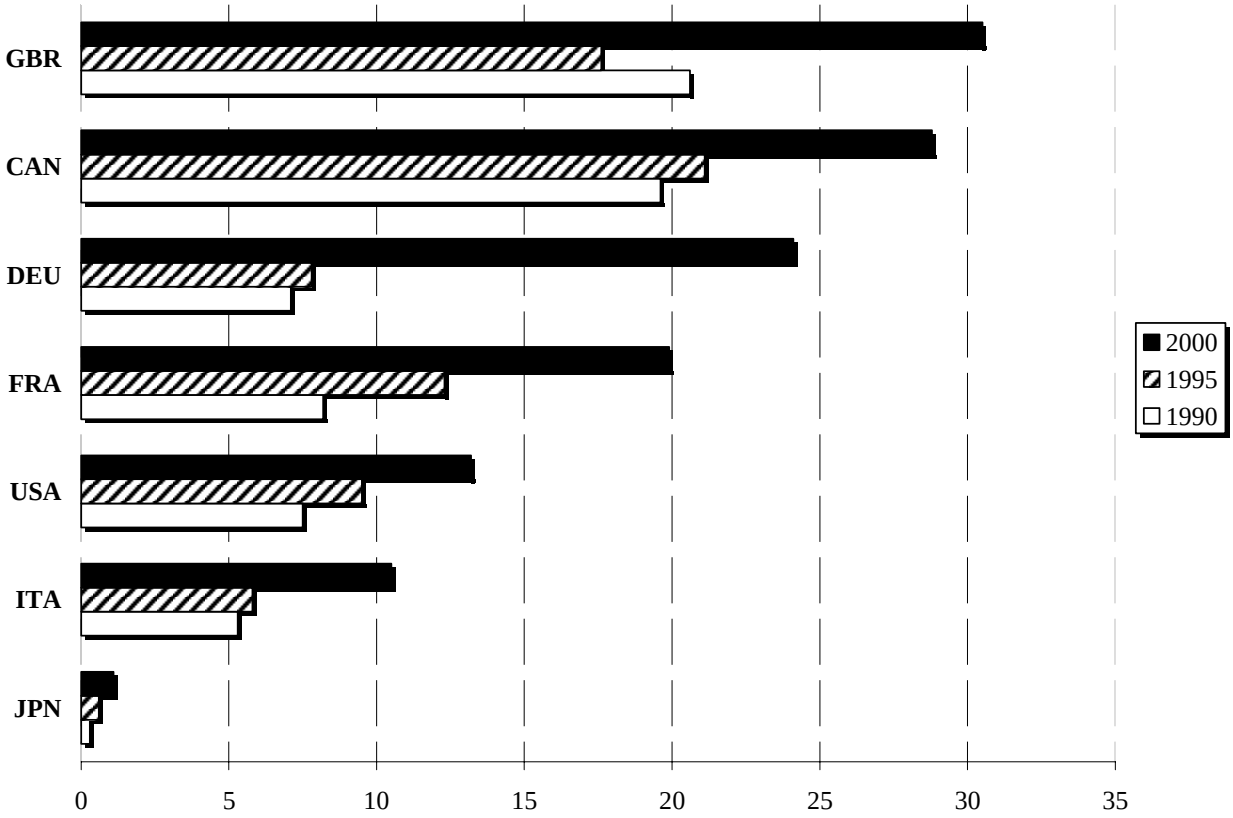
	Inward position		Outward position		Balance
	(million €)	%	(million €)	%	(million €)
OECD	**279 180**	**98.4**	**354 923**	**90.4**	**75 743**
EU-15	176 371	62.2	193 373	49.3	17 002
Non-EU Europe	24 873	8.8	30 895	7.9	6 022
NAFTA	68 355	24.1	118 940	30.3	50 585
Asia & Pacific	9 581	3.4	11 715	3.0	2 134
Non-OECD	**4 054**	**1.4**	**37 319**	**9.5**	**33 265**
Europe	654	0.2	4 030	1.0	3 376
Africa	142	0.1	3 412	0.9	3 270
America	1 177	0.4	15 000	3.8	13 823
Near & Middle East	1 557	0.5	480	0.1	-1 077
Asia & Pacific	524	0.2	14 397	3.7	13 873
Unallocated	354	0.1	198	0.1	-156
World	**283 588**	**100.0**	**392 440**	**100.0**	**108 852**

Source: OECD, 2002b.

Germany's policy environment is strongly embedded in a European context and can not be analysed independently from the Single Market. "The German Way" is characterised by the search for a balance between consensus and federalism, unity and diversity. The constitution or Basic Law (Grundgesetz) foresees several sovereign bodies, anchored in the 16 Bundesländer. Despite decentralisation decisions are driven by consensus. Unions and business associations are intensively consulted. From an international perspective this very fundamental feature of the German economic and policy environment can render thorough understanding of the regulatory framework and active participation in its dynamic modification a demanding task given the pure amount of regulation, public bodies and consultations in place.

Germany initiated the project "Modern State - Modern Administration" in 1999 (Bundesregierung, 2002). The aim of this on-going process is to establish efficient authority structures, use synergies between the different levels of government, reduce red tape and develop a service driven attitude among government officials. In addition, the project aims to expand the use of information and communication technology.

Figure 2: Inward stocks of FDI as a share of gross domestic product in selected OECD countries
(per cent)



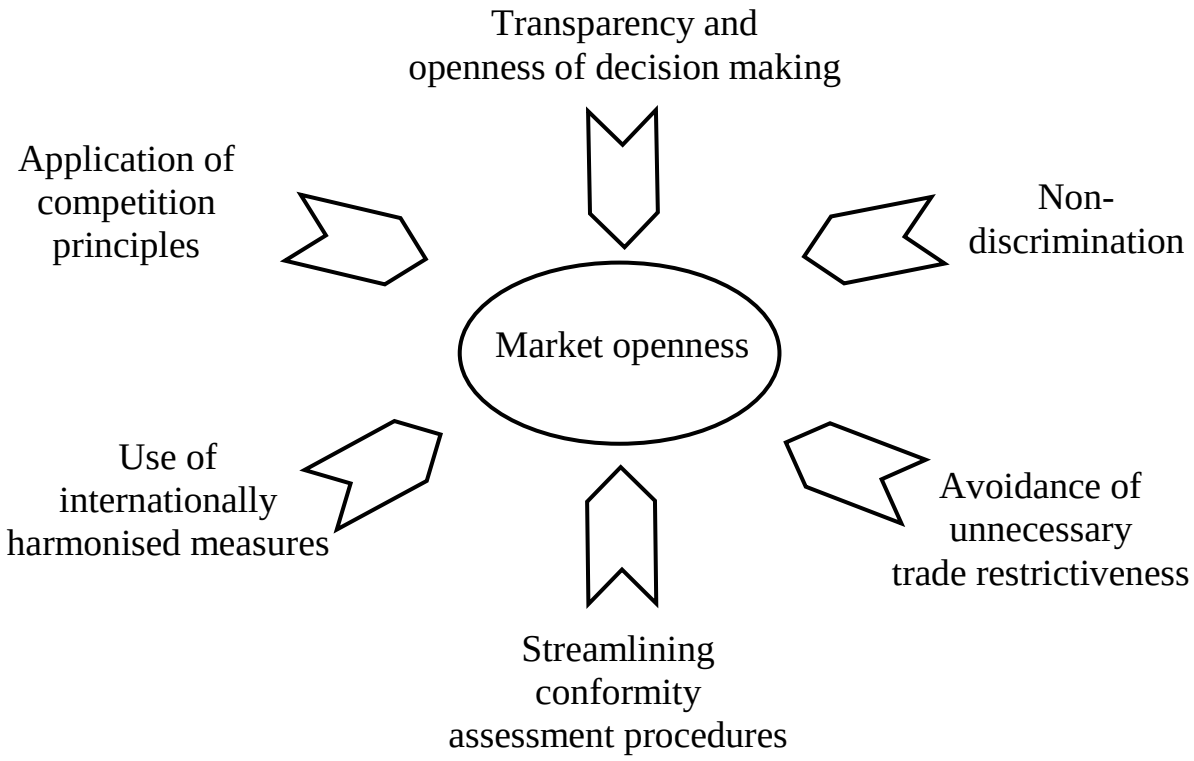
Source: UNCTAD, 2002.

The "Agenda 2010" of the current government draws upon this initiative. In addition to the reduction of administrative burdens it addresses issues such as the stickiness of the labour market, unemployment, the ageing of the population, the tax burden, the promotion of research and education, the maintenance of an adequate public health sector, the expansion of an environmentally responsible energy policy, the fostering of integration of immigrants and a family policy that allows for a balance between family and profession. Among other objectives these reforms aim to cut government services and foster self-responsibility of citizens, while maintaining the principles of a social-market economy. The Agenda includes thirty proposals for reform. Twenty four will be presented by summer 2003 and their implementation will take place successively. Since the Agenda 2010 seeks to take important steps towards regulatory reform, it has a strong potential to foster market openness.

2. THE POLICY FRAMEWORK FOR MARKET OPENNESS: THE SIX "EFFICIENT REGULATION" PRINCIPLES

An important step in ensuring that regulations do not unnecessarily reduce market openness is to build "efficient regulation" principles into the domestic regulatory process for social and economic regulations, as well as for administrative practices. "Market Openness" here refers to the ability of foreign suppliers to compete in a national market without encountering discriminatory or excessively burdensome or restrictive conditions. These principles, which have been described in the 1997 OECD Report on Regulatory Reform and developed further in the Trade Committee, are listed in Figure 3.

Figure 3: The six efficient regulation principles



Source: OECD.

These principles have been identified by trade policy makers as key to market-oriented, trade and investment friendly regulation. They reflect the basics underpinning the multilateral trading system, concerning which many countries have undertaken certain obligations in the WTO and other contexts. The intention in the OECD country reviews of regulatory reform is not to judge the extent to which any country may have undertaken and lived up to international commitments relating directly or indirectly to these principles, but rather to assess whether and how domestic instruments, procedures and practices give effect to the principles and successfully contribute to market openness.

2.1 Transparency, openness of decision making and of appeal procedures

In order to ensure international market openness, the process of creating, enforcing, reviewing or reforming regulations needs to be transparent and open to foreign firms and individuals seeking access to a market, or expanding activities in a given market, an important element of market openness since it might be the source of de facto discrimination against foreigners From an economic point of view, transparency is essential for market participants in several respects. Transparency in the sense of information availability offers market participants a clear picture of the rules on the basis of which the market operates, enabling them to base their production and investment decisions on an accurate assessment of potential costs, risks and market opportunities. It is also a safeguard in favour of equality of competitive opportunities for market participants and thus enhances the security and predictability of the market. Such transparency can be achieved through a variety of means, including systematic publication of proposed rules prior to entry into force and use of electronic means to share information, such as the Internet. Transparency of decision making further refers to the dialogue with affected parties, which should offer well-timed opportunities for public comment, and rigorous mechanisms for ensuring that such comments are given due consideration prior to the adoption of a final regulation. Market participants wishing to voice concerns about the application of existing regulations should have appropriate access to appeal procedures. Such dialogue allows market forces to be built into the process and helps avoid trade frictions. This sub-section discusses the extent to which such objectives are met in Germany and how. It also provides insights on two specific areas, technical regulations and government procurement, in which transparency is essential for ensuring international competition.

2.1.1 General Overview

Germany is a well-regulated country. Although significant efforts are made to maintain transparency, access to information and consultation mechanisms might still be a challenge for international stakeholders given the amount and complexity of legally binding texts and the federal structure of the country. Foreign traders and investors are confronted with a heavily regulated system that, in addition, can vary from Land to Land. An example of the difficulties for foreigners can be seen in the consultation mechanisms like hearings on new legislation. As German politics are driven by consensus, the amount of consultation mechanisms is large. Another example can be seen in the area of public procurement. Public procurement tenders published in the official Journal of the EU accounts for less than 1%, which leaves potential international suppliers with little information on opportunities in this field. Gaining a comprehensive overview of the legal architecture for procurement is further complicated by an exceptionally comprehensive and partially contradictory framework. In addition no adequate legal protection is in place for tenders below the EU threshold and -in accordance with EU law- calls for tender can be avoided if municipality owned companies can provide the service. The current government's Agenda 2010 aims tackle many of these issues. To give an example it seeks to improve the horizontal and vertical co-ordination of implementing and creating regulations at the federal and Länder level. Furthermore there is a tendency to decrease the number of laws.

2.1.2 Access to information

The extent of regulation in Germany is very comprehensive**.** Tax law in particular is very complex. Internationally 60 per cent of academic literature on tax law is published in German. The perception that the majority of government officials and representatives of business and consumer associations has a like in other countries a legal background is therefore not deceiving. The complexity of regulation calls for an important number of personnel capable of administering the regulatory framework. In Germany this can partially be explained by a longstanding tradition in the German administration dating

back into the 19th century and before that. Obviously it feeds itself. It is not a response to the proliferation of regulations; rather it seems natural to proliferate regulations, if everyone involved in the process is quite comfortable dealing with the regulatory framework on that basis.

Any legally binding text has to be published in the Federal Law Gazette which can also be accessed via the Internet. Issued by the Federal Ministry of Justice it is the most important source of regulation and any further information provided by individual ministries is supplementary. Furthermore, the Federal Government gives users access to consolidated versions of the federal laws centrally and via the homepages of the individual Federal Ministries free of charge within the framework of a service it provides for citizens. This service is supplemented by an up-dating service that is also free of charge in which amended laws provide links to consolidated legal texts as amended. Each Federal Ministry is in this way by itself responsible for the publication of regulations and adherence to transparency. So far no need has been perceived for central monitoring of these activities.

Laws, ordinances and by-laws of organisations exercising public power have to be published before they enter into force. There is however no obligation to publish drafts.[1] Hence, information on legal texts only becomes available after the committee involved has come to a consensus or reached a decision by a vote, as is the case of parliamentary committees. This suggests that incumbents may have an information advantage compared to citizens and international stakeholders.

The Agenda 2010 outlines explicitly that it is essential to abolish unnecessary provisions in order to promote economic growth. The country wants to increase the use of alternatives to laws which might possibly lead to a decrease of the current amount of legal texts. By reassessing the federal law, the country furthermore aims to withdraw outdated regulation.

2.1.2 Consultation mechanisms

"Laws are like sausages, it is better not to see them being made."(Otto von Bismarck)

Germany adheres to a consensus driven tradition, many legally binding decisions are reached in this way. German participatory politics is characterised by an intensive level of horizontal co-ordination and exchange of experiences, views, information and good practice in the forefront of rulemaking. Apart from the Länder, consultations can involve trade unions, business associations, NGOs or consumer associations.[2] The responsibility to contact relevant stakeholders lies within the respective federal ministry. Timeline and choice of consultative parties can vary markedly between different public bodies. The majority of OECD countries have established open notice-and-comment procedures instead of or mostly in parallel to inviting clearly identifiable stakeholders. In Germany however the administration determines who is invited to consultation mechanisms. However responsible agencies wish to avoid allegations of inadequate, unbalanced or late consultations, which might provoke a hearing at the Federal Parliament.

The interests of foreign stakeholders are generally expressed through professional associations. Foreign parties have in principle the same opportunities for comments and consultation before the adoption of a new or modified regulation as domestic interest groups. There is no formal system in place for the consultation of foreign parties and there are no data collected on how often foreign players have been

1. This requirement derives from the Basic Law, from the Act on the Promulgation of Ordinances having the force of law and from the relevant specialist law for by-laws.

2. Ministries often seek a consensus with some parties, but this does not imply that a consensus is sought with everybody, or that a stakeholder is consulted in the first place. A consensus with the Länder is necessary if their interests are affected.

consulted. Rather it is assumed that business organisations like the Federal Association of German Industry (BDI) adequately represent foreign companies' interests since there is no formal distinction between domestic and foreign entities. In the German view the interests of the latter can therefore be taken up by the same business organisations. Access is not possible for parties that do not belong formally to these bodies, which can result in a de facto exclusion from foreign interests.

The procedure of public consultation is regulated by the Joint Rules of Procedure of the Federal Ministries, a manual on legal drafting and guide of assessment of regulatory impacts. The relevant sections ask for:

- The incorporation of the broadest possible scope of expertise via comprehensive provisions for participation within the Federal Government.

- The greatest possible degree of transparency via timely involvement of relevant bodies.

The Joint Rules of Procedure also offer guidelines on co-operation between different ministries. Some ministries, like the Federal Ministry of the Interior, always have to be consulted for the purpose of verification, whereas others are only contacted when a perceived interest within its competence is affected. The current government's Agenda 2010 seeks to improve co-ordination and interaction, especially in cases where different ministries are involved.

2.1.3 Openness of Appeal procedures

Appeal procedures are equally open to foreign as well as domestic parties and no distinction is made on the basis of origin. No data are kept on the use of appeal procedures by foreign parties before public courts.

The rules of procedure under public law ensure complete legal redress against acts of the state within Germany. This is anchored in the Basic Law. Before a citizen can contest the legality of the claim, it has –in principle- to be checked in extra-judicial preliminary proceedings. The aim of this procedure is to ensure the self-monitoring of the administration, reduce the workload of courts and afford citizens legal redress.

Depending on circumstances, claims can be brought to administrative courts and regional social appeals procedures, followed by higher administrative courts and federal administrative courts. Recourse to appellate courts usually involves legal process. With the exception of the federal constitutional court, decisions of higher administrative courts can not be appealed beyond the federal administrative courts.

2.1.4 Transparency of technical regulations and standards

The German Institute for Standardisation (DIN), a non-governmental technical association, has been given responsibility for establishing and maintaining voluntary technical standards. Given the importance of the German manufacturing industry, it is of particular importance for its smooth functioning that DIN assures transparency. Reflecting the German context, DIN promotes transparency through different communication channels, but the amount of standards and committees is huge.

When adopting or modifying a standard, DIN follows the set of guidelines, which require consensus based decision making when adopting a standard. The DIN itself is responsible for identifying all relevant stakeholders and inviting them to discussions. For SMEs it can however be a challenge to follow the debates in the relevant committees since the workload is extensive and reaching a decision can

take several years. In 2002 there were some 83 committees, assisted in their work by 4100 working parties (DIN, 2001). Decisions are made public, once consensus has been reached in a committee.

Existing standards are made public through a range of means. Use is made of information and telecommunications technology. Registered members can download about 30 000 standards and technical regulations from the DIN's website. Moreover, the DIN database contains the most important standards and technical specifications from ISO and other standards developing organisations. The integration of North American standards is under preparation. Additionally DIN maintains the German Information Centre for technical rules (DIETR) and publicly accessible standards collections in all major German cities (usually in public libraries). German standards are printed and distributed by the Beuth publishing house (belonging to the DIN group). Beuth's purpose is to edit any texts relevant to the work of DIN. DIN makes an effort to publish in languages other than German in order to reduce language barriers for foreigners. Technical standards are checked every five years for their relevance and are withdrawn if necessary. Box 1 explains the mechanisms of the provision of information on technical regulations and standards at the EU level.

Box 1 Provision of information in the field of technical regulations and standards: Notification obligations in the European Union

In order to avoid erecting new barriers to the free movement of goods which could arise from the adoption of technical regulations at the national level, European Union Member States are required by Directive 98/34 (which has codified Directive 83/189) to notify all draft technical regulations on products, to the extent that these are not a transposition of European harmonised directives. This notification obligation covers all regulations at the national or regional level, which introduce technical specifications, the observance of which is compulsory in the case of marketing or use; but also fiscal and financial measures to encourage compliance with such specifications, and voluntary agreements to which a public authority is a party. Directive 98/48/EC recently extended the scope of the notification obligation to rules on information-society services. Notified texts are further communicated by the Commission to the other Member States and are in principle not regarded as confidential, unless explicitly designated as such.

Following the notification, the concerned Member State must refrain from adopting the draft regulations for a period of three months during which the effects of these regulations on the Single Market are vetted by the Commission and the other Member States. If the Commission or a Member State emit a detailed opinion arguing that the proposed regulation constitutes a barrier to trade, the standstill period is extended for another three months. Furthermore, if the preparation of new legislation in the same area is undertaken at the European Union level, the Commission can extend the standstill for another twelve months. An infringement procedure may be engaged in case of failure to notify or if the Member State concerned ignores a detailed opinion.

Although primarily directed at Member States, the procedure benefits private parties by enhancing the transparency of national regulatory activities. In order to bring draft national technical regulations to the attention of the European industry and consumers the Commission publishes regularly a list of notifications received in the Official Journal of the European Communities, and since 1999 on the Internet. Any firm or consumer association interested in a notified draft and wishing to obtain further information or the text may contact the Commission or the relevant contact point in any Member state. The value of the system for private operators has been enhanced with the initiative of the Commission in 1999 to publish notifications on the Internet. A searchable database of notifications (Technical Regulations Information System -TRIS-) going back to 1997 gives access to the draft text and the notification itself, including the rationale of the regulation and the status of the proposal.

The incentive of countries to notify, and thus the efficiency of the system, has been strongly reinforced by the 1996 *Securitel* decision of the European Court of Justice (Decision of 30 April 1996, CIA Security International SA versus Signalson SA and Securitel SPRL). The decision established the principle that failure to comply with the notification obligation results in the technical regulations concerned being inapplicable, so that they are unenforceable against individuals.

As far as standards are concerned Directive 98/34 provides for an exchange of information concerning the initiatives of the national standardisation organisations (NSOs) and, upon request, the working programmes, thus enhancing transparency and promoting co-operation among NSOs. The direct beneficiaries of the notification obligation of draft standards are the European Union Member States, their NSOs and the European Standardisation Bodies (CEN, CENELEC and ETSI). Private parties can indirectly become part of the standardisation procedures in countries other than their own, through their country's NSOs, which are ensured the possibility of taking an active or passive role in the standardisation work of other NSOs.

Notification obligations in the field of technical regulations and standards are complemented by a procedure requiring Member States to notify the Commission of national measures derogating from the principle of free movement of goods within the EU. The procedure has come in response to the persistence of obstacles to the free movement of goods within the Single Market. Member States must notify any measure, other than a judicial decision, which prevents the free movement of products lawfully manufactured or marketed in another Member State for reasons relating in particular to safety, health or protection of the environment. For example Member States must notify a measure which imposes a general ban, or requires modifying the product or withdrawing it from the market. So far, this procedure has produced limited results.

Source: European Commission.

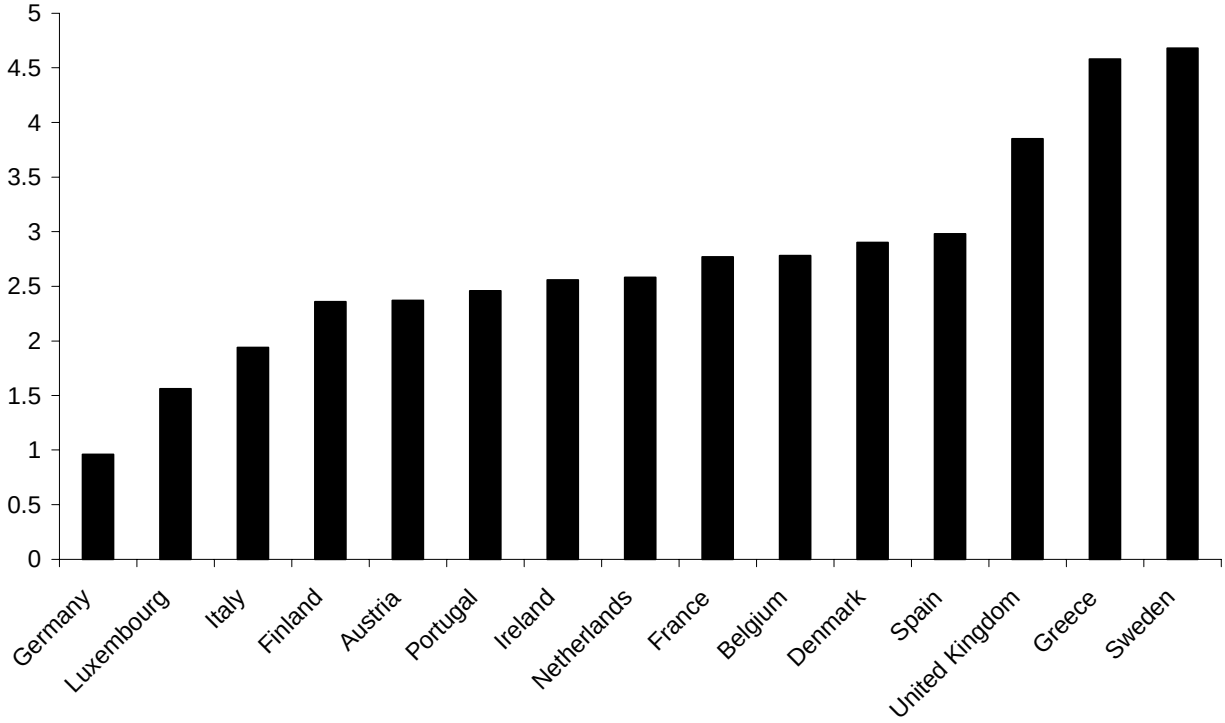
2.1.5 Public procurement

Among the EU member states Germany has the lowest level of openly advertised calls for public procurement in the official Journal of the EU (Figure 4). Public procurement published at the European level accounted for little less than 1 per cent of GDP in 2001 in Germany, whereas the total value for public procurement contracts was estimated at 17.1 per cent of GDP. This can partially be explained by the fact that only tenders above the EU threshold have to be published at the European level, whereas a very high share of public procurement tenders are below the threshold in Germany. In order to offer SMEs adequate possibilities to compete for bids, many tenders (construction contracts, freelance services) are split up (principle of decentralised procurement). Since publication at the European level is henceforth not necessary, international players may find it a demanding task to learn about bidding possibilities for a contract since in many cases they do not have the possibility to get informed by a transnational journal translated in many different languages, but rather have to gather information in German at the national level.

The transparency of public procurement is further made more difficult by an exceptionally complex and partially contradictory legal framework that can –below the EU threshold- vary from Land to Land and lacks adequate appeal procedures. The limited transparency in the area of public procurement creates an uneven playing field for foreign traders and investors with potentially high costs for the German economy. The German government has recognised the need for change and is currently identifying areas of improvement. The complexity of the regulatory framework is reflected in the following paragraphs.

In Germany, acknowledged European directives have been implemented in a way so that previous national law remains partially in existence. Key to the application of one of the parallel legal systems is the estimated value of a tender, if the value of a public procurement contract is above a particular threshold, European law applies; if the value is below the threshold, national law applies. In the latter case the law can vary according to the Land. International bidders competing for contracts below the EU threshold need therefore legal competence under sixteen different regulatory frameworks.

Figure 4: Openly advertised public procurement as advertised in the Official Journal of the European Union, 2001
(in per cent of GDP, provisional data)



Source: European Commission.

The level of the EU threshold varies by type of procurement. In the area of construction the value of the contract has to be above € 5 Mio and € 200 000 for other goods and services. For sector contracting authorities the limit lies at € 400 000, while for ministries and higher federal authorities the threshold is at € 130 000 in order to have European principles applied. European Regulation was therefore translated into a multi layered, interwoven legal framework:

- The Act against Restraints on Competition (GWB),
- The ordinance for public procurement (Vergabeverordnung),
- The procurement codes (Verdingungsordnung)
    - VOB The code for awarding public works contracts,
    - VOL The code for awarding public goods and service contracts,,
    - VOF The code for awarding service contracts provided by freelance workers.

The Act against Restraints on Competition (GWB) incorporated rules about procurement in 1999. It determines the principles and definitions of public procurement and contains provisions concerning legal protection. The ordinance for public procurement (Vergabeverordnung) contains further provisions (e.g. the obligation to inform bidders of the forthcoming awarding of the contract; electronic tendering, conflict

of interest) and refers to the procurement codes. The procurement codes contain the general terms and conditions about the course of the procurement procedure.

In addition, the European regulation was put in place in a way that some newly introduced paragraphs partially refer to established national law. In this way European legislation was introduced through the backdoor in national legislation. This particularity does not exist elsewhere in the German legal landscape and has led to a lack of legal transparency. The introduction of these European paragraphs in the national regulation ("a" and "b" paragraphs) has therefore not achieved the aim of maintaining coherence of the legal framework.

Committees of awarding authorities and contractors (Verdingungsausschüsse) were created to foster self-regulation and decisions "coming from practice and made for practice". These committees create the procurement codes (Verdingungsordnungen). However decisions have the character of internal directives and obtain legal status only above the EU thresholds by reference of the ordinance for public procurement. From an international perspective the representation of non-national interests is lacking since these bodies are composed of, the departments at the federal and the Länder level and the municipal and business associations representing important domestic clients. Self-regulatory activities express the interests of the stakeholders that compose them. In the context of the integration of global economies, the structure of these bodies may no longer provide sufficient room for taking third party interests under concern and this may in some cases undermine market openness.

Calls for tenders have to be made public either domestically or at the European level depending on the contractual value involved. In line with EU law a tender can be avoided if a public company could provide the requested good or service. This rule applies independently of the level of the threshold at stake and does not help to promote international competition.

Procedures of national public procurement tenders are not streamlined, but can follow six different modes, depending on the value of the contract. From an international perspective it is therefore not easy to gain an understanding of the various possibilities. Above the threshold a procedure can either be open, restricted or negotiated. Below the thresholds it can be public, restricted or appear as an invitation for tenders with discretionary award for the contract ("freihändige Vergabe"). Although named differently, the three different categories above and below the threshold are similar to each other (Marx and Jasper, 2001). The public or open procedure is addressed to an unlimited group of participants. All the other procedures refer to a restricted group of bidders that were chosen beforehand on the basis of competition. Public authorities are not free to choose any set of procedures. Bid invitations under VOL and VOB have to comply with a strict hierarchy. The open procedure prevails over the restricted, which again prevails over the negotiated call.

Box 2 EU rules on public procurement

Public procurement in the European Union accounted for 11 per cent of GDP of the EU in 1996. Before common directives were passed at the European level not more than 2 per cent of public tenders were attributed to foreign firms. Within the OECD countries it accounted for 20 per cent of GDP in 1998 (OECD, 2001).

Because of its economic importance it has been considered as one of the cornerstones of the Single Market and led to the adoption of a series of rules aimed at promoting a climate of openness and fairness and securing enhanced competition in the area of public works, supplies and services. A special framework is applied to utilities (energy, water, telecommunications and transport). Some of the major requirements of EU rules on public procurement are the following:

Information: Contracting authorities must prepare an annual indicative notice of total procurement by product area that they envisage awarding during the subsequent 12 months. The annual indicative list and any contract whose estimated value exceeds specific thresholds must be published in the Official Journal of the European Communities. Tenders must indicate which of the permitted award procedures is chosen (open, restricted or negotiated) and specify objective selection and award criteria. Contracting authorities must also make known the result of the tender procedure through a notice in the Official Journal of the European Communities. Provisions setting minimum periods for the bidding process ensure effective opportunity of interested parties to participate in the tender.

Remedies: Member States must provide appropriate judicial review procedures of decisions taken by contracting authorities. In particular, they must provide for the possibility of interim measures, including the suspension of procedures for the award of public contracts, for setting aside decisions taken unlawfully and for awarding damages to parties affected by the infringement. The EU Directives require that these procedures be effectively and quickly enforced. Effectiveness and speed may however be difficult to judge in practice, given the diversity of judicial systems across EU member states.

Non-discrimination: This principle, applicable among EU member states, is set by the Treaty of Rome which prohibits any discrimination or restrictions in awarding contracts on the grounds of nationality and prohibits the use of quantitative restrictions on imports or measures with equivalent effect.

Use of international standards: EU rules require the use of recognised technical standards in defining specifications, with European standards taking precedence over national standards.

In May 2000 the European Commission introduced proposals aimed at consolidating and modernising the regulatory framework on public procurement. Their main features are the consolidation of the directives on public works, supplies and services into a single text; incentives for a wider use of information technologies in public procurement; and an improved and more transparent dialogue between awarding authorities and tenderers in determining contract conditions. Initiatives have further focused on transparency, information dissemination and accessibility of appeal procedures. Public procurement tenders are published in the Official Journal, but are equally available electronically. The most prominent e-initiatives are SIMAP (Système d'Information pour les Marchés Publics) and TED (Tenders Electronically Daily). To foster mutual understanding the European Commission developed the Common Procurement Vocabulary (CPV) which is available in all European languages. The European Commission also developed explanatory guides on Community law in that field. The purpose of these publications is to raise awareness among companies of the possibilities in public procurement.

Source: European Commission.

Legal protection for bidders varies according to the value of the contract and does not offer ex-ante protection for bids below the threshold. Above the EU threshold every domestic or foreign bidder can appeal to the public procurement tribunals. There he/she can request application of public procurement law (VOB/A; VOL/A, VOF, Act against Restrictions on Competition and the ordinance for public procurement). The federal public procurement tribunal is seated in the Bundeskartellamt (BKA). Decisions are usually made within five weeks from receipt of the application. The sixteen regional public procurement tribunals are seated in different institutions in each Land. These tribunals can be appealed when a public contract is to be awarded by a regional or local procuring entity. The regional public procurement tribunals are hardly consulted by foreign stakeholders.

Below the EU-threshold, bidders do not have the right to appeal the compliance with public procurement provisions except for general damages claims. Those provisions are part of the budgetary law of the Federal government and the Länder, which does not contain any rules aimed at the legal protection of the individual. The public procurement tribunals do not offer legal protection as the Act against restraints of Competition and the ordinance for public procurement do not apply.

Box 3 General principles for public procurement in Germany

Principle of Private Law
The state acts in its purchases like a private company and therefore takes up the legal status of a natural person in the context of public procurement.

Principle of Competition and Transparency
The state identifies suppliers through international competition. Services are to be assigned through a competitive process to ensure the participation of the greatest number of bidders. This has implications on the procedures of public procurement tenders. Since there are many different possibilities to conduct a procedure, a hierarchical order has been established. Preference is given to public tenders over restricted tenders who prevail over the negotiated procedure and the single tender action. Once a rule of procedure has been chosen it can not be modified unless the tender is terminated. A call for a tender above the EU threshold needs to be published in the official Gazette of the EU before it can be published domestically. Henceforth, tenders can only be initiated through a publication in the official Gazette of the EU.

Principle of long-term economic efficiency and effectiveness
Tenders should not only be decided on the basis of price only, but should offer value for money. According to EU law social and environmental aspects may be taken into account.

Principle of decentralised procurement
By avoiding centralised procurement, competition among buyers can be maintained and clientilistic structures avoided. Arbitrary discrimination against bidders is prohibited. In order to offer SMEs adequate participation in the bidding process, construction contracts and freelance services are supposed to be split up. This principle of awarding by lots only applies to VOB and VOL. To avoid unfair competition no bidder is allowed to improve his/her offer ex post in order to obtain a tender.

Principle of consensus
Since the 1920s the rules of public procurement are being created by the committees of awarding authorities and contractors. Decisions have to be taken by consensus in general. The construction sector represents an exception. Here a three/quarter majority is generally sufficient. Due to the amendment of public procurement law (VgRÄG) in 1998, tenders above the EU threshold are beyond the competences of the committee of awarding authorities and contractors. They can therefore not draft regulation in that domain.

Principle of budget law
Decisions made by consensus within the committees of awarding authorities and contractors below the EU threshold are being fed into the budgetary law of the Federal Government and the Länder. In this way the committees of awarding authorities and contractors are bound to find decisions that reflect the general framework of the budgetary law and accountancy. The legal character of the decisions of the committee of awarding authorities and contractors is that of internal directives. Therefore bidders have neither the right nor the legal protection to demand the compliance with public procurement rules.

Source: Federal Law Gazette 1994 II, p.1724 ff, Marx/Jasper (2001).

2.2 Measures to ensure non-discrimination

The application of the non-discrimination principles, Most-Favoured-Nation (MFN) and National Treatment (NT), in making and implementing regulations aims at providing effective equality of competitive opportunities between like products and services irrespective of country of origin, and thus at

maximising efficient market competition. The application of the MFN principle means that all foreign producers and service providers seeking entry to the national market are given equal opportunities, while national treatment means that foreign producers and service providers are granted treatment that is no less favourable than that granted to domestic producers and service providers. The extent to which respect for those two core principles of the multilateral trading system is actively promoted when developing and applying regulations is a helpful gauge of a country's overall efforts to promote a trade and investment-friendly regulatory system.

2.2.1 General Overview

Germany's policy with regard to non-discrimination in the application of its domestic and trade-related regulations is strongly embedded within the context of its membership in the WTO and the European Union. The only specific exception to MFN maintained by Germany under the WTO (GATS) is in the area of rental/leasing without operating personnel of ships and of rental ships with crews

2.2.2 Non-discrimination in domestic regulation

As a member of the EU and the WTO, Germany has assumed obligations of ensuring the compliance of domestic regulations with the MFN and national treatment principles. The country is proud to have had mechanisms in place to implement such policies as early as the beginning of the 20th century. The agreement establishing the WTO and the related agreements have been translated into German law via a treaty law within the meaning of article 59(2) sentence 1 of the Basic Law. They are thus in force and must be observed by all public authorities.

In the field of trade in services Germany has claimed exceptions from the MFN principle with respect to rental/leasing of services without operating personnel with reference to ships and rental of ships with crews. By doing this Germany would like to be able to make the chartering of foreign ships by clients resident in Germany dependent on the condition of reciprocity. Otherwise Germany adheres to the EU-wide list of exemptions to MFN treatment in the GATS, the schedules of commitments to market access and national treatment.[3] These are composed of EU-wide exemptions and commitments as qualified by the additional restrictions attached by individual Member States, often replacing full commitments by partial commitments or unbound limitations.

In the area of public procurement, non-discrimination and equal treatment of international bidders are supposed to be a basic principle of EU law. The only exception is that contracting authorities in the field of drinking water or energy supply or in the transport sector can reject tenders for services in which more than 50 per cent of the goods originate from countries outside the European Economic Area and with which there is no other agreement on reciprocal market access. If two or more offers of goods are of equal value, such a bid must be rejected (Article 36 EU directive 93/38/EEC, implemented in section 12 of the public procurement ordinance). However, in the process of law making it is not clear whether committees of awarding authorities and contractors represent adequately interests of international stakeholders since they consist of historical incumbents and lack adequate foreign participation.

There are very few special provisions or exceptions with regard to non-discrimination in particular sectors. According to the 1998 Act for the energy sector, an electricity utility can refuse access to

[3]. Federal Law Gazette 1994 II, p. 1438, p. 1723 ff

the system to deliveries from abroad until the end of 2006 unless a customer in the respective foreign country can also be supplied from Germany. [4]

2.2.3 Preferential Agreements

Preferential Agreements give more favourable treatment to specified countries and are thus inherent departures from the MFN principle. The extent of a country's participation in preferential agreements is not in itself indicative of a lack of commitment to the principle of non-discrimination. In assessing such commitment, it is relevant to consider the attitudes of participating countries towards non-members in respect of transparency and the potential for discriminatory effects. Third countries need access to information about the content and operation of preferential agreements in order to make informed assessments of any impact on their own commercial interest. In addition, substantive approaches to regulatory issues such as standards and conformity assessment can introduce potential for discriminatory treatment of third countries if, for example, standards recognised by partners in a preferential agreement would be difficult to meet by third countries.

As a founding member of the EU, Germany's regulatory regime and trade patterns have been profoundly affected by the efforts to create a Single European Market. While the standards and results were not always considered satisfactory by third party trading partners, efforts have been made to keep the process open to these countries and to apply regional policies on an MFN basis. At the European level a number of preferential agreements have been concluded. The most prominent are the agreements with EFTA countries, the association agreements with Central and Eastern European countries and Mediterranean countries, the Cotonou agreements with ACP countries and the General System of Preferences for developing countries. Transparency is assured through a variety of avenues including the Internet and publications such as the European Bulletin. Furthermore the European Commission notifies any new preferential agreements to the WTO. The WTO Committee on Regional Trading Agreements reviews all preferential agreements, in a process that consists among other things of written questions and answers. In this context the Dispute Settlement Mechanism of WTO offers remedy for third parties considering themselves prejudiced. When new preferential agreements are under negotiation, the European Council examines questions such as the compatibility with all relevant WTO rules, the impact on other external commitments of the EU and the likelihood that the agreement would foster the advancement of the multilateral trading system. Furthermore Germany has signed over 120 bilateral agreements on the promotion and protection of investment.

2.3 Measures to avoid unnecessary trade restrictiveness

To attain a particular regulatory objective, policy makers should favour regulations that are not more trade restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Examples of this approach would be to use performance-based rather than design standards as the basis of a technical regulation, or to consider taxes or tradable permits in lieu of regulations to achieve the same legitimate policy goal. At the procedural level, effective adherence to this principle entails consideration of the extent to which specific provisions require or encourage regulators to avoid unnecessary trade restrictiveness and the rationale for any exceptions; how the impact of new regulations on international trade and investment is assessed; the extent to which trade policy bodies as well as foreign traders and investors are consulted in the regulatory process; and means for ensuring access by foreign parties to dispute settlement.

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4. Article 4 section 2, corresponding to Article 19(5) of directive 96/92/EC of the European Parliament and the Council of 1996 regarding rules for the internal market in electricity; OJEC 1997 Nr. L27 p. 20

2.3.1 General Overview

Regulatory Impact Assessment is a fairly novel concept to Germany and it is still too early to evaluate the level of efficiency and effectiveness of these measures. RIA in its present form only dates back to the latest revisions of the Joint Procedures' paragraph 44 in 2000. However, important elements of RIA have been on the agenda since 1984 ("Blue Test Questions"). The current lack of assessments are therefore not so much due to RIA's newness, but rather to the general lack of evaluations in this field. Currently, there are no efforts taken to assess the implicit or explicit impact of regulations on trade and investment.

International players in principle encounter the same administrative burdens as domestic players. Since, however, they are confronted with a different regulatory framework from their home country, the exactitude and preciseness with which regulation is applied may be particularly burdensome. While this guarantees legal predictability, it makes market access for foreign players more difficult, costly and time consuming. FDI agencies aim, among other things, to assist traders and investors in their interaction with the administration. Their impact might however be limited by the heterogeneous organization of these offices. Customs has made important steps to ease its procedures and put the customs online with the ultimate aim of providing paperless services. Germany has recognized the need to reduce red tape and taken first steps like the establishment of the "controlling bureaucracy" division or legal advisory "one-stop-shops" at the local level.

2.3.2 Assessing the impact of regulations on trade

Efforts by the German government to assess the impact of regulations do not explicitly deal with trade and investment related matters, defined as the impact of domestic regulation on trade and the impact of trade regulations on trade. As for all EU Member States, competence for trade policy resides with the Community; however, many aspects of implementation of Community trade policies and related regulation takes place at the national level, with potential risks for imperfect achievement of a "level playing field." It is therefore subject to discussion whether trade specific regulatory impact assessment should not be pursued, particularly since the German impact assessment is open to evaluate each kind of possible result.

In Germany Regulatory Impact Assessment is a relatively new concept enjoying priority under the current government programme "Modern State, Modern Administration".[5] The value added of Regulatory Impact Assessment is seen in leading to improvement in the quality and a decrease in the quantity of regulation by providing better consideration of its economic impact. Since most parts of the German civil service have traditionally had a legal background, the attention to the economic effects of laws and regulations represents an important innovation.

The consensus driven approach to rule making is viewed in the context of RIA as an advantage. When legal rules have been drafted, several practice tests can be conducted with the objective to predict potential consequences. Equally, once regulation is in place the country aims to give adequate attention to side effects of rules and evaluate whether they have achieved their goal. Of particular interest to the trade community appear to be efforts to assess the impact of public procurement provisions. Given the novelty of the RIA approach it is still too early to assess results.

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[5]. The main sources of information on the conduct of Regulatory Impact Assessment can be found in the guideline prepared by the Ministry of Interior. It draws upon research by the University of Speyer and Article 44 of the Joint Rules of Procedure.

2.3.3 Reducing administrative burdens on business

The type and degree of difficulties with administrative procedures that international players encounter do not differ significantly from those domestic firms face. Nevertheless, the exactitude of the German administration might render it more difficult for foreign stakeholders to overcome administrative burdens, despite the obvious advantage of legal predictability The federal structure of the country might pose an additional challenge to achieve command of the comprehensive legal architecture and understand the specific responsibilities of various governmental levels.

Surveys conducted by the "Global Competitiveness Report", "The World Competitiveness Yearbook", Perspektive-Deutschland.de" and "Bureaucracy-Impediment to Enterprise Creation" indicate that there is a perception among the business community that administrative burdens can pose a problem. According to the Global Competitiveness Report the competence of personnel in the public sector is below the median of 3.5 for the 75 countries surveyed; the same is true for the overall burden of regulation. On the other hand Germany is around the OECD average concerning burdens for start-ups, licences and days needed to start a firm.[6] (Table 3) The World Competitiveness Yearbook attributes to Germany a score of 2.77 out of a maximum of ten and therefore indicates that bureaucracy does hinder business activities.[7] Perspektive-Deutschland.de indicates that six out of ten citizens willing to start a business view regulatory burden as the main impediment. Financial risks are ranked at the 2nd place.[8] (Figure 5) "Bureaucracy- Impediment to Enterprise Creation" [9] found that every sixth creation of a new business was delayed by licensing requirements. Typically construction licensing and enterprise- and operational licenses contributed most to the delay. The process was further delayed since traditionally one public institution can only grant permission if other public authorities involved have given their consent. The administration was generally perceived as friendly, although the creators of start-ups often had difficulties understanding legalistic texts.

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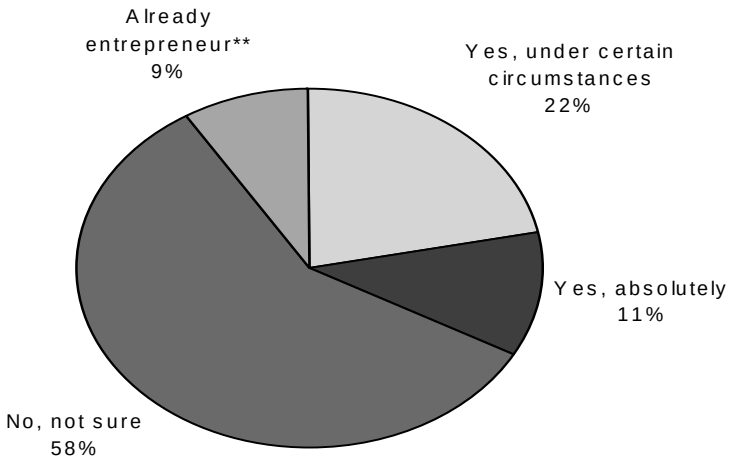
6. Porter/Sachs/Cornelius/Schwab, 2002. The index uses a dual approach. The first led by Sachs focuses on "the set of institutions and economic policies supportive of high rates of economic growth in the medium term" The second approach conducted by Porter uses microeconomic indicators to "measure the set of institutions, market structures, and economic policies supportive of high current levels of prosperity". The index assesses the productive potential of 75 economies. Both approaches combine hard data and survey data. The executive opinion survey records the perspective of business leaders around the world. In 2001 4600 distinguished responses were received. The index therefore reflects therefore the perceptions and views of the business community.
7. IMD, 2002. The World Competitiveness Yearbook covers 40 countries. The survey combines statistics from international, regional and national sources with an executive opinion survey. In 2002 3 532 responses were received.
8. T-Online/Stern/McKinsey, 2002. Perspektive-Deutschland.de is an online survey carried out by T-online, Stern and McKinsey in 2001. Results reflect the views of 170 000 German citizens aged 28-59 participating in the study.
9. Deutsche Ausgleichsbank, 1999. "Bureaucracy-Impediment to Enterprise Creation" is a study conducted in 1998 by Deutsche Ausgleichsbank. Six thousand five hundred bank customers were interviewed and their experience with the administration quantified.

Table 3. Administrative Burdens in OECD countries

Description	Competence of Public Officials	Burden of Regulation	Extent of Bureaucratic Red Tape	Administrative Burden for Start-Ups	Permits to Start a Firm	Days to Start a Firm
	The competence of personnel in the public sector is (1=lower than the private sector, 7=higher than the private sector)	Administrative regulations in your country are (1=burdensome, 7=not burdensome)	How much time does your company's senior management spend working with government agencies/regulations? (1=less than 10% of its time, 2=10-20%, 3=21-30%, …, 8=71-80%)	Starting a new business in your country is generally (1=extremely difficult and time consuming, 7=easy)	Approximately how many permits would you need to start a new firm? (median response listed for each country)	Considering license and permit requirements, what is the typical number of days required to start a new firm in your country? (median response listed for each country)
Australia	3.2	3.6	2.5	5.4	5.0	30.0
Austria	3.2	3.2	2.0	4.3	5.0	35.0
Belgium	2.8	2.8	1.5	4.8	8.0	90.0
Canada	3.4	3.7	2.1	5.5	3.0	22.0
Czech Republic	2.3	3.4	1.8	4.3	4.0	60.0
Denmark	3.3	3.1	1.7	4.9	3.0	30.0
Finland	3.3	5.3	1.6	6.3	3.0	22.5
France	3.5	2.7	1.8	4.1	5.0	30.0
Germany	3.1	3.4	1.6	4.8	3.0	30.0
Greece	1.8	2.8	2.4	3.5	6.5	60.0
Hungary	2.8	3.7	2.5	5.4	5.0	45.0
Iceland	3.3	5.5	1.6	6.0	3.0	5.0
Ireland	3.6	4.5	1.8	5.1	3.0	15.0
Italy	2.3	2.4	2.6	4.1	10.0	105.0
Japan	3.8	3.0	1.4	4.5	3.0	30.0
Korea	3.0	2.9	1.9	4.2	10.0	30.0
Luxembourg	n/a	n/a	n/a	n/a	n/a	n/a
Mexico	2.6	2.4	2.5	3.2	10.0	90.0
Netherlands	3.1	4.4	1.4	5.5	3.0	10.0
New Zealand	3.3	3.7	1.9	5.7	3.0	10.0
Norway	3.0	2.9	1.5	5.1	5.0	10.0
Poland	2.7	3.3	2.1	5.2	3.0	30.0
Portugal	2.2	2.8	2.1	4.4	5.0	60.0
Slovak Republic	2.0	3.0	3.2	2.8	5.0	30.0
Spain	3.2	4.7	1.8	4.4	5.5	60.0
Sweden	3.7	4.0	1.7	5.7	5.0	25.0
Switzerland	3.0	4.6	1.4	5.6	3.0	24.0
Turkey	2.1	2.4	2.9	4.1	5.0	45.0
United Kingdom	3.1	3.9	1.8	5.6	2.0	7.0
United States	2.7	4.0	1.7	6.0	4.0	30.0

Source: Porter, M., J. Sachs, P. Cornelius, and K. Schwab (2002). *The Global Competitiveness Report 2001-2002*. Oxford University Press, Oxford and New York.

Figure 5: Readiness to start a new business (*)



*. Question: Would you envisage starting a new business? in percent of survey respondents.
**. Entrepreneurs, Free lancer, Part-time entrepreneurs.
Source: T-Online/Stern/McKinsey (2002). "Perspektive Deutschland: Projektbericht zur Grössten Online-Umfrage Deutschlands."

Initiatives to reduce administrative burden are given priority in the government program "Modern State-Modern Administration" and in the current "Agenda 2010". The Federal Ministry of Economics and Labour has established a division named "controlling bureaucracy" whose purpose it is to monitor and reduce red tape. Furthermore the country is expanding the use of information and communication technology. As part of these reform programmes Germany already succeeded in putting over 170 administrative procedures online. "Bund online 2005" is an e-government initiative that continues to form an important part of "Modern State-Modern Administration" and the "Agenda 2010". At the local level, action has also been taken. In particular it is aimed to establish "one-stop-shops" in the medium term throughout the country in order to improve the interface between enterprises and local authorities.[10]

Different FDI agencies offer support to foreign investors in their interaction with the administration. At the federal level this is the case of two offices, the Industrial Investment Council (IIC) and the Federal Commissioner for Foreign Investment in Germany (foreign-direct-investment.de). At the regional level there are 1000 offices in place whose purpose is to attract FDI. Despite the advantage of the extensive coverage given to this issue, the heterogeneous structure of these offices may continue to cause difficulties to foreign business.

[10]. For example the initiative *"Gründerfreundliche Kommune"*, gruenderfreundliche-kommune.de.

Box 4 Promoting competitiveness through the improvement of the business environment:

Simplification initiatives in the European Union *

Efforts to improve the business environment by enhancing regulatory quality and reducing the regulatory burden have been central to the European strategy for the achievement of the Single Market. Initiatives aimed at simplifying the business environment in Europe include the *Simpler Legislation for the Internal Market* (SLIM) project, the *Business Environment Simplification Task Force* (BEST) and the *European Business Test Panel.**

SLIM, which was launched in 1996, consists of an *ex post* regulatory impact assessment and consolidation mechanism. Small teams composed of officials from different member states and of users of the legislation, review Community legislation in particular sectors with a view to identifying concrete suggestions for simplification. These suggestions, which are not binding, may then be used as a basis for amendments proposed by the Commission to the Council. The focus is on provisions that give rise to excessive implementation costs and administrative burdens, diverging interpretations and national application measures and difficulties in application. Areas for review may be proposed by regulators or business associations, who should indicate what the problems to be addressed are and the benefits anticipated from simplification. Reviewed legislation is usually at least 5 years old in order to allow its strengths and weaknesses to be properly identified.

Since 1996, SLIM reviews have taken place in 14 sectors, including ornamental plants, classification of dangerous substances, pre-packaging, construction products, fertilisers, electromagnetic compatibility, banking, insurance and company law, recognition of diplomas, social security rules, VAT, internal trade statistics and nomenclature for external trade. The Commission has proposed amended legislation on six of these and three have been adopted by the Council and the Parliament. Proposals on the remaining sectors are underway. The effectiveness of the project has been reviewed by the Commission, which highlighted the importance of an appropriate follow up by EU institutions of the concrete suggestions put forward by the SLIM teams. Indeed, SLIM recommendations are formulated on average within six months but the process afterwards is quite protracted. As regulatory costs and red tape related to national and regional regulation, were estimated at 3-5 per cent of the EU GDP, some SLIM teams have tried to incorporate parallel reviews of national implementation of the reviewed Community legislation. However, these attempts were too ambitious for the means and resources of the teams to ever be successful. It was thus proposed to complement SLIM reviews with co-ordinated parallel exercises in the Member States.

BEST was created in 1997 to investigate the regulatory and administrative environment and support measures that directly affect the competitiveness of SMEs. It was composed of business representatives, public officials and academics. Recommendations focussed on access to financing, human resources management and training, innovation and technology transfer, as well as all aspects of public administration and its contacts with the enterprises. As regards the improvement of public administration it was particularly stressed that the assessment of regulatory impact on business should be central to the decision-making process; that the launching of SMEs should be facilitated by simplifying applicable procedures; and that the transparency and efficiency of rules of operation should be enhanced. An Action Plan was established in 1999 on the basis of the BEST report. Most of its actions are currently underway.

European Business Test Panels were first set up in 1998 as a pilot tool in the framework of the European Commission business impact assessment system. The Panels were designed as a complement to the existing consultation procedures and aimed at assessing compliance costs and administrative burdens, especially in the area of trade and industry, and identifying alternative solutions. They would be set up at the national level in each Member State that volunteered to participate, and operate according to the Member's consultation traditions and procedures. Panels would bring together representative firms from the concerned sectors and work under very short timescales to avoid delaying the legislative process. Their conclusions would then feed into the cost-benefit analysis undertaken by the Commission.

During the trial phase Business Test Panels were convened to assess proposals on VAT fiscal representation, Accounting and Waste from Electrical and Electronic Equipment. They allowed consulting from 1067 to 1744 businesses around Europe. The response ratio to the questionnaire was from 35 per cent to 43 per cent. After each consultation a report was issued explaining the opinions of respondents and the steps the Commission envisages in view of these opinions. After two consultations on less contentious matters, the Panel on Electrical and Electronic Waste showed that 77 per cent of the affected businesses found the proposal to be an administrative burden and around half of them that it would require additional investments. The Commission will take into account these concerns when finalising its proposal.

*Note: *)* The White Book on Governance in Europe evaluated the efficiency of the application of European law in its member countries and ranked Germany eleventh out of its fifteen member countries. The index analyses the level of infringement, the application and implementation of treaties and regulations (European Commission, 2001).

Source: European Commission "*Communication from the Commission to the European Parliament and the Council. Review of SLIM: Simpler Legislation for the Internal Market*" COM (2000)104 final; European Commission "*Communication from the Commission to the European Parliament and the Council. The Strategy for Europe's Internal Market*" COM(1999)464; European Commission "*Action Plan to Promote Entrepreneurship and Competitiveness*" COM(1998)550 final; European Communities "*Report of the Business Environment Simplification Task Force*", Vol.I and II, 1998; European Commission "*Communication from the Commission to the European Parliament and the Council. The Business Test Panel. A Pilot Project*", 1998.

2.3.4 Customs procedures

The costs imposed by customs procedures have attracted growing attention from businesses. Customs procedures encompass formalities and procedures in collecting, presenting, communicating and processing data requested by customs for and related to the movement of goods in international trade. Costs are generated by compliance with documentary requirements (acquiring and completing the documents and paying for their processing) and by delays of cargo processing at borders. The aims of customs procedures (to collect revenue, to compile statistics, to ensure that trade occurs in accordance with applicable regulations, such as those aiming at protection of human safety and health, protection of animal life, environmental protection, prevention of deceptive practices, etc.) should be pursued so as to ensure that the procedures do not create unnecessary obstacles to international trade. In other words, the lowering of trade barriers may not achieve the full efficiency of liberalisation without harmonised, simplified, fast and secured customs procedures.

The German customs administration has taken measures to adapt to the evolving conditions of trade within Globalization. An important example is the field of risk management which is seen as a tool for expediting trade which ensures confidence in the level of regulatory implementation. The administration has a centralised institution for risk analysis (ZORA), where measures to protect the country from risks, in monetary and non-monetary risks, are being co-ordinated. The customs service benefits thereby from its area-wide network throughout Germany. Furthermore ZORA collaborates at the international level and exchanges risk-profiles with counterparts world-wide.

In the area of customs simplification Germany has taken a number of steps to improve certain existing procedures. In line with the European rules set in the EU Common Customs Code, these measures helped the administration and traders to save time and costs and interact in a more efficient and effective way (Bundesministerium der Finanzen, 2002). Henceforth Germany is supporting the EU customs code within the framework of the foreign trade offensive aiming at the elimination of administrative burdens.

Moreover Germany is scheduled to ratify in concert with the EU the Revised Version of the Kyoto Agreement of the World's Customs Organisation (WCO) by mid-2003.[11]

At the European level the e-customs initiative has a dual aim. Firstly, it plans to put customs administration online and improve interface management; secondly it foresees the consolidation of the diverse procedures into three single elements: methods for imports, exports and for goods not subject to clearance. This will decrease the number of provisions and foster transparency.

Germany is applying the first part of the e-customs initiative through the automated Tariff- and Local Customs procedure (ATLAS). ATLAS is an integrated IT solution scheduled to be used at all customs offices throughout the country by June 2003. It will replace various isolated IT systems in place beforehand (ALFA, DOUANE, ZADAT). The ultimate aim of ATLAS is to make procedures paperless. This will offer traders the opportunity to initiate the customs declaration in advance, directly from their location of operations. Like other European systems ATLAS is confronted with the fact that certain provisions of the European Commission can not be mapped on the system since they require human judgement. In addition certain Directorate Generals (DGs) of the European Commission still require paper based proof of customs declarations, which for the moment limits the possibilities of ATLAS to provide paperless services. As to the second pillar ATLAS is currently applying procedures according to the German structure. The system will be modified as soon as consensus has been reached at the European level.

To foster a constructive dialogue with the business community, German customs authorities have engaged in a range of confidence building measures. Legally this is reflected in recent customs decrees. For example, customs officials meet regularly with business associations in working parties. Furthermore German customs engaged in trade facilitation measures such as the application of simplified declaration procedures, local clearance procedures and incomplete customs declarations. In the latter case declarations can be processed either as soon as some initial declarations have been made or when goods are recorded at the premises of the consignee. They are then released for customs procedures largely without any direct involvement of the customs authorities. Over 80 per cent of imports and exports are dealt with under one of these procedures.

2.4 Use of internationally harmonised measures

The application of different standards and regulations for like products in different countries – often explained by natural and historical reasons relating to climate, geography, natural resources or production traditions – presents firms wishing to engage in international trade with significant and sometimes prohibitive costs. There have been strong and persistent calls from the international business community to reduce the costs created by regulatory divergence. One way to achieve this is to rely on internationally harmonised measures, such as international standards, as the basis of domestic regulations, when they offer an appropriate answer to public concerns at the national level. The use of internationally harmonised standards has gained prominence in the world trading system with the entry into force of the WTO TBT Agreement, which encourages countries to base their technical requirements on international

[11]. The "*International Convention on the simplification and harmonisation of Customs procedures*", called Kyoto Convention, entered into force in 1974. The objective of the convention was to simplify and harmonise customs procedures across countries. In June 1999, the Council of the World Customs Organisation (WCO) adopted a revised text in order to adapt the convention to the development of international trade. The new procedures will increase transparency and harmonisation of customs procedures by using new information technology and modern clearance techniques based on risk analysis. The implementation of the Convention will begin once all the forty contracting parties have signed it. So far twelve countries have signed the treaty.

standards and to avoid conformity assessment procedures that are stricter than necessary to create market confidence. Within the European Union, the reduction of standards-related barriers to trade within the Single Market has also been a high priority. This objective is clearly reflected in the "New Approach" on technical harmonisation defined in 1985 by the European Council. Under this approach, public authorities in the EU define common legally binding requirements in order to achieve a certain general objective such as safety, but do not specify technical solutions and mandate European standardisation bodies to draw up European standards that meet these requirements. In principle, manufacturers are free to choose the appropriate solutions that comply with these requirements. However, they have a clear advantage in using European harmonised standards as it gives their products a presumption of conformity with the essential requirements.

In cases where the harmonisation of regulatory measures is not considered feasible or necessary, the recognition of equivalence of other countries' regulatory measures in attaining the same regulatory objective may be the most appropriate avenue for reducing technical barriers related to regulatory divergence. Despite the development of global standards, there are still many areas where specific national regulations prevail, preventing manufacturers from selling their products in different countries and from enjoying full economies of scale.

2.4.1 General Overview

In Germany the international harmonisation of technical regulations and standards is largely shaped in accordance with European standardisation policies. DIN, the German Institute for Standardisation, aims to promote international trade through the adoption of standards harmonised at the European and international level.

2.4.2 Measures to encourage the use of internationally harmonised measures

European and German national standards are increasingly transpositions of international standards produced by international standardisation organisations such as ISO, IEC and ITU; equally various initiatives have been developed at the European level to promote transparency and co-operation at the international level. Apart from the standardisation work mandated by the Commission, most standards are prepared at the request of industry.

The standardisation process in Germany is undertaken in close co-operation with all parties involved, such as other EU member states (through the membership of all European Union national standardisation bodies), industry and consumers (through the representation of industry, consumers, and trade unions associations on the technical committees and working parties responsible for the preparation of the standards) and trading partners (through the association with EFTA and other countries and the co-operation agreements described below). The standards produced are publicly available by means of paper and electronic publications of the standardisation bodies.

The identification number for European standards clearly indicates the relationship with international standards. For instance, whenever a CEN standard is a transposition of an ISO standard it will be referenced by the same number with simple addition of the European prefix in front of the ISO prefix (e.g. EN-ISO 5079 on textile fibres).

Co-operation agreements have been signed between ISO and CEN (Vienna Agreement) and between IEC and CENELEC (Dresden Agreement) to secure the highest possible degree of approximation between European and international standards and avoid duplication of work. A similar agreement is being prepared by ETSI and ITU to take into account the specific aspects of telecommunications.

Furthermore, the European Union is a party to the UN-ECE 1958 Agreement on Automotive Standards. This agreement provides a basis for the technical approval of motor vehicle equipment and parts. It has been supplemented by additional regulations developed by the UN-ECE Working Party on the Construction of Vehicles. UN-ECE regulations have played a major role in the harmonisation process of regulations within the European Union. Thirty-five of them have been recognised equivalent to EU directives that specify technical requirements for the type approval of motor vehicles.

Box 5 Harmonisation in the European Union:

The New Approach and the Global Approach

The need to harmonise technical regulations when diverging rules from Member States impair the operation of the common market was recognised by the Treaty of Rome in Articles 100 to 102 on the approximation of laws. By 1985 it had become clear that relying only on the traditional harmonisation approach would not allow the achievement of the Single Market. As a matter of fact, this approach was encumbered by very detailed specifications which were difficult and time consuming to adopt at the political level, burdensome to control at the implementation level and requiring frequent updates to adapt to technical progress. The adoption of a new policy towards technical harmonisation and standardisation was thus necessary to actually ensure the free movement of goods instituted by the Single Market. The way to achieve this was opened by the European Court of Justice, which in its celebrated ruling on *Cassis de Dijon* (Case 120/78, ECR) interpreted Article 30 of the EC Treaty as requiring that goods lawfully marketed in one Member State be accepted in other Member States, unless their national rules required a higher level of protection on one or more of a short list of overriding objectives. This opened the door to a policy based on mutual recognition of required levels of protection and to harmonisation focusing only on those levels, not the technical solution for meeting the level of protection.

In 1985 the Council adopted the **"New Approach"**, according to which harmonisation would no longer result in detailed technical rules, but would be limited to defining the essential health, safety and other requirements (energy-efficiency, labelling, environment, noise) which industrial products must meet before they can be marketed. This "New Approach" to harmonisation was supplemented in 1989 by the "**Global Approach**" which established conformity assessment procedures, criteria relating to the independence and quality of certification bodies, mutual recognition and accreditation. Since the New Approach calls for essential requirements to be harmonised and made mandatory by directives, this approach is appropriate only where it is genuinely possible to distinguish between essential requirements and technical specifications; where a wide range of products is sufficiently homogenous or a horizontal risk identifiable to allow common essential requirements; and where the product area or risk concerned is suitable for standardisation. Furthermore, the New Approach has not been applied to sectors where Community legislation was well advanced prior to 1985.

On the basis of the New Approach manufacturers are only bound by essential requirements, which are written with a view to being generic, not requiring updating and not implying a unique technical solution. They are free to use any technical specification they deem appropriate to meet these requirements. Products, which conform, are allowed free circulation in the European market.

For the New Approach, detailed harmonised standards are not indispensable. However, they do offer a privileged route for demonstrating compliance with the essential requirements. The elaboration at European level of technical specifications which meet those requirements is no longer the responsibility of the EU government bodies but has been entrusted to three European standardisation bodies mandated by the Commission on the basis of General Orientations agreed between them and the Commission. The CEN (European Committee for Standardisation), CENELEC (European Committee for Electrotechnical Standards) and ETSI (European Telecommunications Standards Institute) are all signatories to the WTO TBT Code of Good Practice. When harmonised standards, produced by the CEN, CENELEC or ETSI are identified by the Commission as corresponding to a specific set of essential requirements, the references are published in the Official Journal. They become effective as soon as one Member State has transposed them at the national level and retracted any conflicting national standards. These standards are not mandatory. However conformity with them confers a presumption of conformity with the essential requirements set by the New Approach Directives in all Member States.

The manufacturer can always choose to demonstrate conformity with the essential requirements by other means. This is clearly necessary where harmonised European standards are not (or not yet) available. Each New Approach directive specifies the conformity assessment procedures to be used. These are chosen among the list of equivalent procedures established by the Global Approach (the so-called "modules"), and respond to different needs in specific situations. They range from the supplier's declaration of conformity, through third party type examination, to full product quality assurance. National public authorities are responsible for identifying and notifying competent bodies, entitled to perform the conformity assessment, but do not themselves intervene in the conformity assessment. When third party intervention is required, suppliers may address any of the notified bodies within the European Union. Products which have successfully undergone the appropriate assessment procedures are then affixed the CE marking, which grants free circulation in all Member States, but also implies that the producer accepts full liability for the product (Council Directive 85/374/EEC of 25 July 1985).

The strength of the New Approach and the Global Approach lies in limiting legal requirements to what is essential and leaving to the producer the choice of the technical solution to meet this requirement. At the same time, by introducing EU-wide competition between notified bodies and by building confidence in their competence through accreditation, conformity assessment is distanced from national control. The standards system, rather than being a means of imposing government-decided requirements, is put at the service of industry to offer viable solutions to the need to meet essential requirements, which however are not in principle binding. The success of the New and Global Approaches in creating a more flexible and efficient harmonised standardisation process in the European Union heavily depends on the reliability of the European standardisation and certification bodies and on the actual efficiency of control by Member States. First, European standardisation and certification bodies need to have a high degree of technical competence, impartiality and independence from vested interests, as well as to be able to elaborate the standards necessary for giving concrete expression to the essential requirements in an expeditious manner. Second, each Member State has the responsibility to ensure that the CE marking is respected and that only products conforming to the essential requirements are sold on its market. If tests carried out by a notified body are cast in doubt, the supervisory authorities of the Member State concerned should follow this up.

Source: Dennis Swann "*The Economics of the Common Market*", Penguin Books, 1995; European Commission "*Documents on the New Approach and the Global Approach*", III/2113/96-EN; European Commission, DGIII Industry, "*Regulating Products. Practical experience with measures to eliminate barriers in the Single Market*"; ETSI "*European standards, a win-win situation*"; European Commission "*Guide to the implementation of Community harmonisation directives based on the new approach and the global approach (first version)*", Luxembourg 1994.

At the domestic level the German Institute for Standardisation (DIN) is in charge of standardisation. DIN develops standards of interest to industry, business and other interested parties (e. g. public authorities, consumers), and provides a range of related support services. The work programmes cover all technical sectors, as well as new areas of activity (e. g. services, environmental protection, and consumer safety).

DIN is a private association and not a government institution. Membership in the DIN is voluntary, open to "the ability to pay". Participants in technical work usually contribute to funding the costs of administrative support for technical bodies. DIN standards have to be purchased. As an independent body of business it is funded mainly through earnings generated by the sale of standards, in addition to business contributions (membership fees, project related aids) and government contributions. Own earnings form by far the most important part of the budget.

DIN is a member of the International Organisation for Standardisation (ISO). DIN fully supports the technical co-operation between ISO and CEN as specified in the Vienna Agreement. Currently about 75 per cent of the standards published in Germany are elaborated at the European and international level. The amount of purely national standards has continuously decreased. The German economy is highly committed to global trade, and thus needs International Standards. Furthermore, the completion of the European Internal Market has promoted the development of European Standards (mostly due to the "New Approach") and has limited the need for national standards. Such "New Approach" Directives limit legislative harmonisation to the adoption of the essential safety requirements with which products put on

the market must conform, while the detailed technical specifications are developed by the European Standards Organisations CEN, CENELEC and ETSI.

When DIN adopts European or international standards as national standards it withdraws all conflicting national standards. Purely national standardisation only takes place in domains where harmonised standards are not available. This is the case for special construction materials, services, special test methods for food products, or special types of plugs. Public procurement tenders are legally bound to require European standards and technical regulations, when they exist. Exceptions can only be made in well-justified cases. This may cause difficulties for contractors of countries not member to the European Union unless their countries of origin adhere to national standards that are internationally harmonised.

DIN is engaged in technical co-operation with developing and transition countries. Its activities include training, teaching and the reduction of technical barriers to trade at the bilateral level. Important partners to DIN are China, Korea, Russia and several Arabic countries such as Morocco. DIN considers its work productive since it increases the scope of market access for German industry.

Furthermore, DIN may decide to refuse the adoption of an International Standard in Germany if it can be assumed that there is no need for a national standard. Items developed by DIN that might be of interest to the international community are presented to ISO or IEC working groups, depending on market needs. One of the best known international standards originated by DIN is the specification of paper size DIN A4.

While standardisation is DIN's core activity, there are some subsidiary companies belonging to the DIN group that offer additional services requested by the market. Such services include the certification of management systems offered by the German Society for the Certification of Management Systems (DQS). DQS awards certificates of conformity to industry respected practices. This may also cover areas such as environmental impact, security of company and customer information, occupational health and safety. In the area of products, services and personnel, DIN CERTCO, offers certification schemes to assess conformity against regulatory and voluntary requirements to standards or to specific requests and needs of manufacturers.

The economic benefits of standardisation are well recognised, necessitating efforts at international and national level. To help raise that standardisation can play an important role for economic growth, DIN offers a prize each year to encourages companies to present concrete examples of the benefits deriving from standardisation, endowed with 15 000 Euro for the most convincing example (DIN, 2001).

2.5 Streamlining conformity assessment procedures

Costs to traders are also imposed by the need to demonstrate the compliance of imported products with applicable regulations in the import country through testing and certification accepted in that country. Recognising the equivalence of the results of conformity assessment performed elsewhere can greatly contribute in reducing these costs. The success of international endeavours to achieve mutual recognition is naturally reliant on the quality of testing, certification and accreditation. In order to ensure the adequacy of these activities to the needs of evolving markets, governments increasingly leave them in the hands of private entities.

2.5.1 General Overview

Germany's policies to promote Mutual Recognition Agreements and Accreditation mechanisms are closely intertwined with efforts at the EU level. Both approaches contributed to the establishment of the Single Market. PECAs, a set of MRAs with acceding countries to the EU, serve as a tool to foster further integration; technically complex or potentially risky products. In Germany accreditation is organised at the sub-federal level. There are seventeen different accreditation intuitions that are all members of the umbrella association, DAR.

2.5.2 Mutual Recognition within the European Union

Germany's efforts to foster the acceptance of Mutual Recognition Agreements are strongly embedded within the European Union. The Single Market created in 1992 would not have been possible without the new regulatory technique of mutual recognition. The "Cassis de Dijon" case decided in 1980 by the European Court of Justice provided the key elements for the new principle. According to mutual recognition, products "legally manufactured or marketed in one country should in principle move freely throughout the community, where such products meet equivalent levels of protection to those imposed by the Member State of exportation, and where they are marketed in the territory of the exporting country." Barriers to trade may only be accepted for the protection of health, consumer protection and environmental protection. If there are no measures taken on the Community level, members are free to legislate on their territory. This measure benefits traders as much as consumers. Products or services corresponding to the requirements of one country of the EU are allowed in any other member country of the Community. This brings down costs for suppliers and offers a wider range of choice to consumers. The regulatory strategy forms the basis of the New Approach and the Global Approach of the EU.

According to reviews of the European Commission the principle functions well in areas which are perceived unproblematic with respect to security problems, like bicycles or containers. However, the European Commission sees scope for improvement for technically complex products or products entailing a potential hazard for health or the environment.

2.5.3 Mutual Recognition agreements with non-EU countries

To foster international trade with third countries the EU has established Mutual Recognition Agreements with countries that have a comparable level of technical development, a comparable approach to conformity assessment for specific products and an important trading volume with the EU. Mutual Recognition Agreements on conformity assessment have been initialled so far with Australia/New Zealand, Canada, Israel, Japan, Switzerland and the USA. (Table 4)

A particular type of Mutual Recognition Agreement has been negotiated with countries acceding membership to the Community. PECAs, Protocols to the Europe Agreement on Conformity assessment and Acceptance of industrial products, offered those ten countries that are scheduled to join the EU in 2004 the possibility to integrate certain sectors in the Single Market prior to accession and foster trade relations. Equally PECAs are under negotiations with potential candidates of the next round of enlargement. Henceforth they serve as a pre-accession congruence tool.

Table 4: Mutual Recognition Agreements concluded or under negotiation by the EU

	Mutual Recognition Agreements							PECAs[d]								
	Australia	New Zealand	United States	Canada	Israel	Japan	Switz-erland	Czech Republic	Hungary	Estonia	Latvia	Lith-uania	Slovakia	Slovenia	Malta	Poland
Construction plant & equipm.								N		N	✓					
Chemical GLP[a]						✓		N								
Pharmaceutical GMP[b]	✓	✓	✓	✓		✓	✓	N		N	N					
Pharmaceutical GLP[a]			N		✓		✓			N	N					
Medical devices	✓	✓	✓	✓			✓	✓	✓							
Veterinary medicinal products								N								
Low voltage electrical equipm.	✓	✓					✓	N	N	✓	N					N
Electromagnetic compatibility	✓	✓	✓	✓			✓	✓	✓	N	N	✓	N	N	N	N
Telecom terminal equipment	✓	✓	✓	✓		✓	✓	✓		N					N	N
Pressure equipment	✓	✓N[c]					✓	✓	N	N	N					N
Equipment & systems used in explosive atmosphere							✓	N								
Fasteners																
Gas appliances & boilers							✓	✓	✓	N				N		N
Machinery	✓	✓					✓	✓	N	N	N	✓	N	N	N	N
Measuring instruments																
Aircraft								N								
Agricultural & forestry tractors							✓									
Motor vehicles	✓	N					✓									
Personal protective equipment							✓	✓	N	N		✓	N		N	N
Recreational craft			✓	✓												
Toys							✓		N		✓					N
Foodstuffs										N	N					

√ Concluded N Under Negotiation

a Good Laboratory Practices

b Good Manufacturing Practices

c The Agreement covers simple pressure equipment. Extension to other pressure equipment is considered.

d Protocols on European Conformity Assessments. Amendments to these agreements are in the pipeline as negotiations on accession advance. In 2002 Romania and Bulgaria sent a formal request expressing their intention to open negotiations on PECAs to the European Commission.

Source: European Commission, DG Trade.

2.5.4 Accreditation

Accreditation is a procedure by which a third party gives formal recognition that a body or person is competent to carry out specific tasks. Accreditation bodies, audit laboratories, certification and inspection bodies at regular intervals and assess their technical competence against a certain set of criteria. In this way accreditation builds confidence by reducing risks for business and consumers.

At the European level, the use of accreditation systems is an important aspect of the Global Approach. As a tool to promote recognition of equivalence they supplement Mutual Recognition Agreements. In Germany accreditation is federally organised. There are eight different accreditation bodies of non-legally regulated issues. These associations are privately owned and operate as a limited liability company or as an incorporated society. In addition, there are nine organisations working in the legally regulated field. These are public institutions of the Federation, the Länder or the municipalities.[12]

All these organisations are members of the German Council of Accreditation (DAR). DAR, founded in 1991, is a working group of the federal government, the Länder and the business community. Its main purpose is to co-ordinate the work of the different accreditation agencies, to represent German interests at the international level and to run a central index of German accreditation and recognition activities. The DAR itself does not grant any accreditation, but generates those resolutions that in addition to corresponding DIN rules form the basis of its members' accreditation activities. Dar represents its members in international associations of accreditation bodies. Henceforth it is a member of international accreditation bodies that seek to promote the international acceptance of certificates and reports issued by their members, such as ILAC, IAF and EA. Contrary to public institutions, most of the privately owned accreditation agencies are also members of these associations.[13] Taking ILAC as an example, 8 out of 51 members are German. Germany however has only one vote. Incidentally membership rules are about to be changed, so the figure of eight members is likely to be reduced. Currentlythe country is the one of the few members represented by more than one organisation in these international associations.

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12. Institutions in the non-legally regulated domain: TGA "Trägergemeinschaft für Akkreditierung"; DAP "Deutsche Akkreditierungsstelle für Technik e.V."; DASMIN "Deutsche Akkreditierungsstelle Mineralöl GmbH; DASET Deutsche Akkreditierungsstelle Stahlbau und Energietechnik; Deutsche Akkreditierungsstelle Chemie GmbH; Gesellschaft für Akkreditierung und Zertifiezierung GmbH; DKD Deutscher Kalibrierdienst.

    Institutions in the legally regulated domain: AKMP Akkreditierungsstelle der Länder für Mess- und Prüfstelles zum Vollzug des Gefahrstoffrechtes; AKS Hannover Staatliche Akkreditierungsstelle Hannover; BSI Bundesamt für Sicherheit in der Informationstechnik; DAU Deutsch Akkreditierung- und Zulassungsgesellschaft für Umweltgutachter; KBA Kraftfahrt-Bundesamt; KL-MESS Koordinierungsstelle der Länder für "Messgeräte"; REG TP Regulierungsbehörde für telekommunikation und Post; ZLG Zentralstelle der Länder für Gesundheitsschutzbei Arzneimitteln und Medizinprodukten; ZLS Zentralstelle der Länder für Sicherheitstechnik

13. TGA, DAP, DaTech, DASET, DKD, DASMIN and DAR are members of ILAC, IAF and EA for their specific activities. DKD adheres to EA and ILAC and DASMIN exclusively to EA.

2.6. Application of competition principles from an international perspective

2.6.1 General Overview

The German administration's perspective on international competition has to be understood in the context of its adherence to a social market economy. Maintaining a balance between fairness and efficiency is of major concern to the country. Available instruments to deter anti-competitive behaviour are well developed at the federal and Länder level. An independent sector regulator for Electricity and Gas is not in place yet. Regional Cartel Offices hardly deal with issues at stake for international companies, but rather help solving local disputes. At the federal level competition authorities have engaged in international collaboration and seek in this way to respond to the new challenges of the global system.

2.6.2 Treatment of competition principles within an international context

The benefits of market access may be reduced by regulatory action condoning anti-competitive behaviour or by failure to correct anti-competitive private actions. It is therefore important that regulatory institutions make it possible for both domestic and foreign firms affected by anti-competitive practices to present their positions effectively. The existence of procedures for hearing and deciding complaints about regulatory or private actions that impair market access and effective competition by foreign firms, the nature of the institutions that hear such complaints, and adherence to deadlines (if they exist) are thus key issues from an international market openness perspective.

The German regulatory framework for competition is based on EU law and on the Act against Restraints on Competition (GWB), passed in 1958. The aim of the Act is to support a market economy by fostering competition. Sector specific provisions apply in agriculture, the credit and insurance industry, the water industry, sports, published products like newspapers or magazines and for copyright collection societies. Competition authorities play no role in regulating international trade through measures such as anti-dumping laws.

The GWB reflects the German attitude towards the "effects" doctrine. If a firm operating abroad creates anti-competitive behaviour on the German market, German competition authorities can intervene. If however a firm operating in Germany has effects abroad it is perceived to be beyond the competence of German authorities. Equally, export cartels are not addressed if their only effect is outside the country.[14]

The German federal structure is reflected in the institutions ensuring the application of competition law. At the federal level the Bundeskartellamt (BKA) oversees the application of competition law. The BKA is an independent higher Federal authority, which is responsible to the Federal Ministry of Economics and Labour. Its main task is to apply the Act against Restraints on Competition (GWB). In particular it seeks to enforce the ban of cartels, exercise merger control and control abusive practices. It is also assigned all tasks indicated in the competition rules of the EC Treaty. At the regional level each Land

14. For details compare Chapter 3: Before the 1999 amendments, export cartels were formally subject to the general prohibition, but the GWB then provided an exception for them. (FCO 2002) That meant that export cartels had to register and create a record of their existence. International trade and market factors are considered in analysis, principally as matters of fact. Although markets are likely to be formally defined in domestic terms, the potential for foreign supply can be a factor in the appraisal of competitive effects. (FCO, 2002)

has its own competition authority. It has authority to act when a supposedly anticompetitive behaviour affects the Land. However, only the Bundeskartellamt has the authority to decide on mergers.

At the sector level a notable role is played by the Competition Authority for Telecommunication and Postal Services (RegTP). It is in charge of the control of abusive practices as outlined in the Telecommunications Act (TKG) and the Postal Act (PostG). Its central purpose is to control the former monopolists Deutsche Telekom and Deutsche Post and to offer market entrants equal opportunities in the market. In addition RegTp aims to assume an advocacy role for consumers. Like the BKA it is responsible to the Federal Ministry of Economics and Labour. There is no sector specific competition body in the energy sector, but the establishment of such a body is under discussion in order to implement EU legislation.

The Monopoly Commission (Monopolkommission), seated along with the Bundeskartellamt (BKA), prepares every two years an assessment and a forecast of the level of business concentration (main opinion). In addition it evaluates the applications of provisions on merger control and comments on topical issues of competition policy (special opinion).

International players benefit from the fact that the BKA is a well funded institution enjoying a strong reputation in the country so that pressure from domestic interests can be contained. The World Competitiveness Yearbook gives Germany 7.47 points out of ten, supporting the argument that competition legislation in the country prevents unfair competition. The BKA can look back to a traditionally successful cooperation with the European Commission. The BKA is being consulted in transnational cases that might affect Germany. In the context of ongoing reforms at the European level seeking to decentralise the application of European regulations, the BKA appears henceforth well prepared.

The BKA makes particular efforts to ensure the transparency of its procedures. Complaints are handled in an open, accessible manner and hearings and opinions are also public. For example, the BKA makes efforts to be accessible to non-German speakers (e.g. its website is available in English and French). The work of German competition authorities is generally held in high regard, as reflected in the Global Competitiveness Report According to the survey, Germany has a relatively intense level of competition, coming mainly from local companies or subsidiaries of multinationals. Entry of new competitors Germany ranks among the highest within the OECD area (Table 5).

If the BKA needs information on foreign firms not operating on German territory, it typically obtains this in an informal way. The respective national competition authority has to be informed in advance of the planned inquiry. This procedure is an application of the OECD Council Recommendation. The BKA seeks to engage in international co-operation between different competition authorities, particularly in cases where competition-restraining processes or measures by public authorities have cross-border effects. For example, the BKA co-operated with other national competition authorities in a number of merger cases: London Stock Exchange/Deutsche Börse AG (Office of Fair Trading/BKA), RWE/VEW (European Commission/BKA), Covisint (US department of Justice/BKA) and Oy Transfennica/Finnlines Oyi (Kilpailuvirasto/BKA). To increase the effectiveness of cross-border merger control, the BKA agreed together with members of the European Competition Authorities (ECA) to share non-confidential information.

RegTP is equally promoting international co-operation. Apart from the collaboration with the European Commission, the institution is a member of the Independent Regulators' Group (IRG), a platform for information exchange. With Non-members of IRG, RegTP organises mutual visits to exchange information.

Further activities to enhance international co-operation have been the signing of several bilateral and multilateral agreements. With Austria and Yugoslavia Germany has concluded treaties on judicial assistance. These treaties address issues such as investigations, hearings, the taking of evidence, service and enforcement. The bilateral agreements between Germany and France as between Germany and the USA focus on mutual information and consultation in cases, which may be of interest for both countries, as well as on the regulation of the procedure for the concrete co-operation. The aim of these treaties is comparable to that of the OECD Council Recommendation. At the multilateral level Germany signed numerous agreements through the EU. In practice, however they have been of little relevance to individual cases.

Table 5: International Competition in OECD countries

Description	Intensity of Local Competition In most industries, competition in the local market is (1=limited and price-cutting is rare, 7=intense and market leadership changes over time)	Extent of Locally Based Competitors Competition in the local market comes primarily from (1=imports, 7=local firms or local subsidiaries of multinationals)	Entry into Local Markets Entry of new competitors (1=almost never occurs in the local market, 7=is common in the local market)
Australia	5.6	4.7	5.0
Austria	5.8	4.9	5.5
Belgium	6.2	5.3	5.9
Canada	5.7	4.9	5.3
Czech Republic	5.5	4.2	5.7
Denmark	5.3	4.8	5.2
Finland	6.1	5.5	5.8
France	6.1	5.6	5.6
Germany	6.3	5.2	5.9
Greece	5.2	4.7	5.2
Hungary	5.3	4.2	5.4
Iceland	5.3	4.6	5.2
Ireland	5.6	4.3	5.3
Italy	5.3	4.9	5.1
Japan	5.4	4.7	4.9
Korea	4.9	4.8	4.9
Luxembourg	n/a	n/a	n/a
Mexico	5.0	4.7	5.0
Netherlands	6.2	5.0	5.6
New Zealand	5.8	4.3	5.5
Norway	5.5	4.9	4.6
Poland	5.2	4.7	5.4
Portugal	5.3	4.6	5.5
Slovak Republic	5.2	4.0	5.8
Spain	5.7	5.6	5.4
Sweden	5.8	4.2	5.4
Switzerland	5.4	5.0	5.4
Turkey	5.3	5.0	5.4
United Kingdom	6.1	5.4	5.8
United States	6.5	5.8	5.7

Source: Porter, M., J. Sachs, P. Cornelius, and K. Schwab (2002). *The Global Competitiveness Report 2001-2002*. Oxford University Press, Oxford and New York.

3. ASSESSING RESULTS IN SELECTED SECTORS

This section takes a closer look at the implications for market openness arising from regulations in two manufacturing and two services sectors of considerable economic importance for the German economy: automobiles, telecommunications equipment, telecommunications services, and electricity. For each sector, an attempt has been made to assess the effects of sector-specific regulations on international trade and investment and the extent to which the six efficient regulation principles are applied. More detailed reviews of the telecommunications and electricity sectors, respectively, can be found in chapters 5 and 6.

Germany's merchandise trade is largely concentrated on chemicals, manufactured goods, and machinery and transport equipment. These three sectors accounted in 2001 for almost 80 per cent of the country' merchandise exports and were responsible for its surplus in the trade balance (Table 6). Concerning services trade, German imports have exceeded exports throughout the 1990s. The main net-importing sectors in 2001 were travel, business services and transportation (Table 7).

Table 6: Sectoral structure of merchandise trade, 2001

	Imports		Exports		Balance
	(mill. €)	%	(mill. €)	%	(mill. €)
Food and live animals	29 916	5.4	21 313	3.3	-8 603
Beverages and tobacco	4 976	0.9	4 133	0.6	-843
Crude materials, inedible, except fuels	16 968	3.1	8 939	1.4	-8 029
Mineral fuels, lubricants and related materials	46 869	8.5	8 896	1.4	-37 973
Animal and vegetable oils, fats and waxes	1 139	0.2	1 241	0.2	102
Chemicals and related products, n.e.s.	54 963	10.0	80 815	12.7	25 852
Manufactured goods classified chiefly by material	69 064	12.6	86 077	13.5	17 013
Machinery and transport equipment	206 202	37.5	331 166	52.0	124 964
Miscellaneous manufactured articles	66 884	12.2	59 482	9.3	-7 402
Other commodities and transactions	53 293	9.7	35 269	5.5	-18 024
Total	**550 273**	**100.0**	**637 333**	**100.0**	**87 060**

Source: Statistisches Bundesamt, 2002.

The three core manufacturing sectors, i.e. chemicals, manufactured goods, and machinery and transport equipment, also account for about two-thirds of the inward and outward FDI stocks in the manufacturing sector. However, most FDI is undertaken in the services sector, which in 1999 accounted for more than 80 per cent and more than 70 per cent, respectively, of inward and outward stocks (Table 8). Overall, Germany's outward stock of FDI exceeded the country's inward position by almost 40 per cent, with a deficit in the FDI balance only in four sectors: real estate and business activities, vehicles and transport equipment, food products, and hotels and restaurants.

Table 7: Sectoral structure of services trade, 2001

	Debits		Credits		Balance
	(mill. €)	%	(mill. €)	%	(mill. €)
Transportation	28 126	18.2	22 952	23.5	-5 174
Travel	51 607	33.4	19 232	19.7	-32 375
Communications services	3 494	2.3	1 804	1.8	-1 691
Construction services	5 273	3.4	3 981	4.1	-1 293
Insurance services	1 257	0.8	1 779	1.8	522
Financial services	4 127	2.7	4 566	4.7	439
Computer and information services	7 124	4.6	5 199	5.3	-1 925
Royalties and licence fees	5 850	3.8	3 515	3.6	-2 336
Other business services	42 689	27.6	29 626	30.3	-13 062
Personal, cultural and recreational services	3 718	2.4	374	0.4	-3 344
Government services	1 476	1.0	4 777	4.9	3 301
Total	**154 742**	**100.0**	**97 804**	**100.0**	**-56 939**

Source: OECD, 2003b.

Table 8: Sectoral structure of FDI stocks, 1999

	Inward position		Outward position		Balance
	(mill. €)	%	(mill. €)	%	(mill. €)
Primary sector	**673**	**0.2**	**3 641**	**0.9**	**2 968**
Agriculture & fishing	129	0.0	432	0.1	303
Mining & quarrying	544	0.2	3209	0.8	2 665
Manufacturing	**45 041**	**15.9**	**103 976**	**26.5**	**58 935**
Food products	2 281	0.8	2 008	0.5	-273
Textiles and wood activities	1 338	0.5	3 361	0.9	2 023
Petroleum, chemical, rubber & plastic products	15 913	5.6	36 084	9.2	20 171
Metal and mechanical products	5 661	2.0	12 765	3.3	7 104
Office machinery & communication equipment	6 496	2.3	3 166	0.8	-3 330
Vehicles and other transport equipment	4 616	1.6	18 298	4.7	13 682
Other manufacturing	8 736	3.1	28 294	7.2	19 557
Services	**237 875**	**83.9**	**284 822**	**72.6**	**46 947**
Electricity, gas & water	518	0.2	1 757	0.4	1 239
Construction	471	0.2	1 187	0.3	716
Trade & repairs	24 947	8.8	41 369	10.5	16 422
Hotels & restaurants	644	0.2	577	0.1	-67
Transport & communication	1 555	0.5	7 088	1.8	5 533
Financial activities	26 898	9.5	74 385	19.0	47 487
Real estate & business activities	182 223	64.3	155 884	39.7	-26 339
Other services	619	0.2	2 575	0.7	1 956
Total	**283 588**	**100.0**	**392 440**	**100.0**	**108 852**

Source: OECD, 2002b.

3.1 Automobiles

The increasing trend towards internationally integrated production systems in the automobile sector and frequent policy interventions of some governments aimed at protecting domestic producers have in the past often led to trade tensions, particularly concerning standards and certification procedures. For reasons of safety, energy conservation and environmental protection, automobiles remain among the most highly regulated products. In this context, divergent national approaches to the achievement of legitimate domestic objectives have the potential to continue to influence export and import patterns and give rise to trade concerns.

The automobile industry is a sector of considerable importance in Germany. In 2001, it had 770 000 employees and accounted for about 17 per cent of total manufacturing turnover. The industry is highly export-oriented. Almost 70 per cent of the 5.7 million cars and trucks that were produced in Germany during 2001 were destined for use outside the country. About 55 per cent of export revenues were obtained from sales to other EU countries, 17 per cent from exports to NAFTA countries, and 14 per cent from shipments to European countries that are not members of the EU-15. Total export revenues exceeded the value of automobile imports by more than 130 per cent, with the sectoral trade balance showing a surplus for all major geographical regions (Table 9).

Table 9: Geographical structure of German trade in road vehicles, 2001

	Imports		Exports		Balance
	(million €)	%	(million €)	%	(million €)
OECD	**48 393**	**96.0**	**102 413**	**87.5**	**54 020**
EU-15	33 154	65.8	64 693	55.3	31 539
Non-EU Europe	7 956	15.8	12 418	10.6	4 462
NAFTA	3 438	6.8	20 157	17.2	16 720
Asia & Pacific	3 845	7.6	5 146	4.4	1 301
Non-OECD	**2 023**	**4.0**	**14 585**	**12.5**	**12 562**
Europe	595	1.2	4 364	3.7	3 768
Africa	557	1.1	2 427	2.1	1 870
America	118	0.2	1 325	1.1	1 207
Near & Middle East	14	0.0	2 941	2.5	2 927
Asia & Pacific	739	1.5	3 528	3.0	2 789
Unspecified	1	0.0	66	0.1	65
World	**50 417**	**100.0**	**117 064**	**100.0**	**66 647**

Source: OECD, 2003a.

The German automobile industry is also well established abroad through foreign subsidiaries. The outward stock of FDI is about four times as high as the sectoral inward stock (Table 8). In fact, automobile production at German-owned subsidiaries abroad amounted to about three quarters as much as the industry output in Germany during 2001 (VDA, 2002). Concerning activities of foreign producers in Germany, there are no special legal provisions applying to foreign companies or their products, and several foreign firms, including Ford and General Motors, maintain major production sites in Germany.

The regulatory framework applying to automobile production is largely based on EU regulations. Since the completion of the Single Market, detailed technical requirements for motor vehicles have been established by EU Directives and applied in all EU and EFTA Member States. According to the latest information available on the sectoral implementation of EU regulations (May 2000), Germany had at the time transposed all but two of the 165 directives related to motor vehicles into national law (European Commission, 2000).

At the international level, harmonisation in the automobile sector is advanced through the United Nations Economic Commission for Europe (UN-ECE) and, in particular, its Working Party on the Construction of Vehicles (Box 6). Germany is participating in this work through the EU. The activities in the Working Party have in several cases fostered agreement on the equivalence of regulations that are applying in the EU with those that have been established within the UN-ECE framework. Moreover, a parallel UN-ECE based agreement on the establishment of "global technical regulations for wheeled vehicles, equipment and parts to be fitted on or used by them" aims since 1998 to harmonise technical standards without pursuing a single regulatory system.

Box 6 The role of UN-ECE in harmonising technical regulations in the automotive sector

The United Nations Economic Commission for Europe has played a major role in moving the automotive sector towards international harmonisation of motor vehicle safety and environmental regulations and co-ordination of vehicle safety and environmental research. A specialised ECE body, the Working Party on the Construction of Vehicles (commonly referred to as WP-29) has become a *de facto* global forum for the international harmonisation of technical standards for motor vehicles. WP-29 brings together regulators and representatives of manufacturers of vehicles and parts, consumers and other stakeholders from a wide range of countries. Up to January 2002, more than 110 regulations had been developed. They provide for equal safety requirements and set environmental protection and energy saving criteria for governments and vehicle manufactures in the 38 contracting parties to the 1958 agreement.

Source: European Commission, 2002.

The certification of passenger cars and motorcycles through an EU-wide approval system has been mandatory since 1998 and 1999, respectively, and has replaced the previously existing national approval procedures. Each vehicle type, whether domestically produced or imported, must be brought to an approved testing facility, inspected and certified that it meets the relevant technical EU-regulations for the vehicle. Once a car or motorcycle is granted type-approval certification in a recognised testing facility in any one of the Member States, the certificate is valid in all EU states. The "whole vehicle type-approval" system is scheduled to be extended to buses and commercial vehicles over several years and become mandatory for these vehicles in 2011.

Despite the progress made in the areas of harmonisation and certification, some obstacles to open automobile markets in Germany and the EU remain, as shown by the persistence of significant price differentials for cars across national borders. On several occasions, the European Commission has fined German automobile producers for pursuing discriminatory pricing policies in different national markets, despite claims from the affected companies that the price differentials were merely due to differing value-added and luxury taxes in Member countries. For example, in 1998 the European Commission fined Volkswagen € 102 million for systematically forcing its authorised dealers in Italy to refuse to sell Volkswagen and Audi cars to foreign buyers. It was found that Volkswagen had devised a strategy aimed at preventing, or at least substantially restricting, sales from Italy to other Member States, especially Germany and Austria. Moreover, in 2001, the Commission imposed a fine of nearly € 72 million on DaimlerChrysler for infringing the EC competition rules in the area of car distribution, as DaimlerChrysler had impeded parallel trade in cars and limited competition in the leasing and sale of motor vehicles.

In order to address problems in the area of car market competition, the EU passed a new regulation in 2002 on vertical agreements and concerted practices in the motor vehicle sector. This regulation replaced an earlier block exemption that limited the applicability of EU competition rules in the automobile sector. The regulation is intended to open the way to greater use of new distribution techniques, such as internet sales, foster competition between dealers, make cross-border purchases of new vehicles easier, and increase transparency with respect to sales of cars and associated services. It also introduces major changes as regards the exemption of agreements for the provision of repair and maintenance services by authorised and independent repairers and other independent operators, such as on-

road assistance operators, distributors of spare parts and providers of training for repairers. The new regulation came into force on 1 October 2002, with a one-year transition period allowing for the adaptation of existing contracts (European Commission, 2002).

Concerning, more specifically, alleged discriminatory practices on the German automobile market, domestic and foreign companies can take recourse through the legal system. For example, proceedings with the Bundeskartellamt were pending by the end of 2002 concerning the complaint of the French automotive components supplier *Valeo* against its German competitor *LuK*. The German firm has been accused of abusing a dominant market position by making excessive use of patent rights and thus impeding investments by rival firms in the production of competing products.

As the automobile sector is subject to increased integration at the European level, the quality of the regulatory framework in terms of international openness needs to be assessed primarily at the EU level. For example, the use of international standards and recognition of certificates of conformity stem from EU level policy. Transparency of regulations and rulemaking also depends essentially on the EU's regulatory system. However, each Member State, including Germany, plays a role in contributing to the design of common rules, in transposing them into national law, in disseminating information and in enforcing law in its territory. Of particular interest in this context is the implementation of the new EU regulation on vertical agreements and concerted practices in the motor vehicle sector.

3.2 Telecommunications equipment

In 2001, Germany's trade in telecommunications equipment was roughly balanced. Imports and exports each amounted to about € 21 billion (Table 10). On a geographical basis, Germany was a net-importer of telecommunications equipment from North America and Asia, while a large share of exports went to other European countries.

Table 10: Geographical structure of German trade in telecommunications equipment*, 2001

	Imports		Exports		Balance
	(million €)	%	(million €)	%	(million €)
OECD	**15 801**	**75.7**	**15 779**	**75.3**	**-22**
EU-15	9 042	43.3	11 943	57.0	2 901
Non-EU Europe	2 061	9.9	2 748	13.1	687
NAFTA	2 049	9.8	877	4.2	-1 172
Asia & Pacific	2 672	12.8	211	1.0	-2 461
Non-OECD	**5 042**	**24.2**	**5 164**	**24.7**	**121**
Europe	97	0.5	1 184	5.7	1 087
Africa	21	0.1	627	3.0	606
America	7	0.0	355	1.7	349
Near & Middle East	253	1.2	965	4.6	711
Asia & Pacific	4 663	22.3	2 031	9.7	-2 632
Unspecified	2	0.0	1	0.0	-1
World	**20 868**	**100.0**	**20 944**	**100.0**	**76**

*) includes sound recording equipment.
Source: OECD, 2003a.

The regulation of telecommunications equipment is largely based on EU level developments. Since the late 1990s, the main framework had been set with two "New Approach" directives, notably directive 98/13/EC on telecommunications terminal and satellite earth station equipment and directive 99/5/EC on radio and telecommunications terminal equipment. These will be replaced by a package of

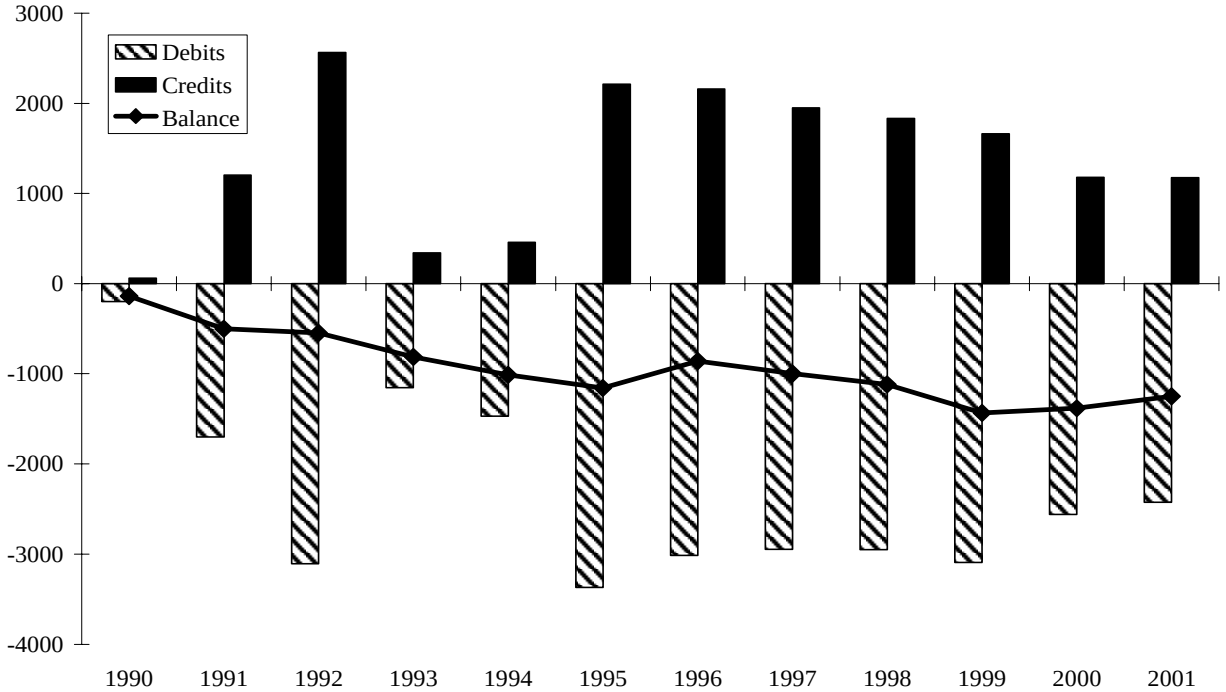
measures for a new regulatory framework for electronic communications networks and services that is scheduled for implementation in Member States from 25 July 2003. The package consists of five proposed European Parliament and Council directives under Article 95, one Commission directive to be adopted under Article 86 and one proposed Commission Decision on a regulatory framework for radio spectrum (see chapter 6 for details). Standards that are consistent with the requirements laid down in EU law are developed by the European Telecommunications Standards Institute (ETSI). Reflecting the fast technological developments in the sector, ETSI produced no less than 2 172 standards during 2001, of which 1 623 were technical specifications, 320 European standards, and 191 technical reports (ETSI, 2001).

Germany participates in the activities of ETSI and other international standardisation bodies through the German Committee for Electronical, Electronic and Information Technologies (DKE), which is jointly operated by DIN and the Association for Electronical, Electronic and Information Technologies Verband der Elektrotechnik, Elektronik und Informationstechnik (VDE) With respect to the elaboration of mandatory technical regulations and the notification of specifically national regulations, no specific procedures apply to telecommunications equipment. There are several mutual recognition agreements that apply to telecommunications equipment and allow under certain conditions for the acceptance of results of conformity assessments performed in Australia, New Zealand, and NAFTA countries.

3.3 Telecommunications services

As described in detail in chapter 6, the German telecoms market was fully opened to competition in 1998 in line with EU regulations, after having been gradually liberalised since 1992. Throughout this period, Germany has been a net-importer of telecommunications services and the trade deficit has tended to increase over time (Figure 6).

Figure 6: German trade in telecommunication services (million €)



Source: OECD, 2003b.

There are no formal restrictions on the activities of foreign companies on the market for telecommunication services in Germany. Licences are issued by the regulatory authority based on a written application. A licence may only be refused if the applicant does not dispose of the necessary reliability, capacity or expertise, or if the granting of the licence would endanger public safety or order. In case of dispute, recourse to the administrative courts is open equally to domestic and foreign companies.

In 1998/99, there were several complaints of US carriers regarding interconnection arrangements of *Deutsche Telekom AG* (DTAG). The controversial issue concerned alleged discrimination through the so-called migration rule, according to which network operators interconnected with DTAG have to migrate to a point of interconnection if they permanently exceed the permissible traffic volume of 48.8 Erlang. The Münster Higher Administrative Court decided, however, that the migration rule was covered by the Telecommunications Act as a reasonable measure to avoid atypical traffic and concentrations of traffic in the DTAG network.

3.4 Electricity

As discussed extensively in chapter 5, recent reforms have transformed the electricity sector in Germany fundamentally. Based on an EU directive that established minimum standards for the regulation and structure of electricity provision, Germany amended its Federal Energy Law and Competition Law in 1998. This involved the removal of legal monopolies for the supply of electricity and exclusive supply territories, the right of third-parties to non-discriminatory access to electricity transmission and distribution, and the determination of the access terms and prices of electricity transmission and distribution through negotiated agreements involving the principal actors in the sector ("Associations' Agreements").

International trade has the potential to foster competition and thereby support the regulatory reforms undertaken in the German electricity sector during the late 1990s. In 2000, Germany traded electricity with all the countries (except Belgium) with whom it has a land border, and with Sweden (Table 11). Total imports and exports amounted to about 45 000 GWh and about 42 000 GWh, respectively. The net-imports of about 3 000 GWh corresponded to about 0.5 per cent of total domestic electricity production.

Table 11: Geographical structure of Germany's trade in electricity, 2000

	Imports		Exports		Balance
	(GWh)	%	(GWh)	%	(GWh)
Austria	5 940	13.2	7 390	17.6	1 450
Czech Republic	8 930	19.8	230	0.5	-8 700
Denmark	6 410	14.2	550	1.3	-5 860
France	15 350	34.0	410	1.0	-14 940
Luxembourg	740	1.6	4 400	10.5	3 660
Netherlands	900	2.0	16 680	39.6	15 780
Poland	690	1.5	2 010	4.8	1 320
Sweden	650	1.4	90	0.2	-560
Switzerland	5 520	12.2	10 330	24.5	4 810
Total	**45 130**	**100.0**	**42 080**	**100.0**	**-3 050**

Source: IEA, Electricity Information, 2002.

Competition also depends on the conditions for market entry. Following the electricity market reforms in 1998, there have been a number of cross-border transactions involving German electricity companies that have significantly increased the international exposure of the German electricity industry (Table 12 and Table 13). In particular, two of the four major groups in the German market (*EnBW* and *HEW/Bewag/VEAG*) are since 2001 to a significant degree controlled by foreign companies. It is however unclear to what extent the new owners will increase competitive pressures in the industry.

Table 12: Examples of foreign participation in German electricity companies, 2001

German electricity producer	Foreign company	Participation (%)
EnBW	Electricité de France, FRA	34.5
HEW	Vattenfall, SWE	71.3
Stadtwerke Bremen	Essent, NLD	51.0
Stadtwerke Kiel	TXU Corporation, USA	51.0
Stadtwerke Görlitz	Vivendi Universal, FRA	74.9

Source: VDEW, 2002.

Table 13: Examples of German participation in foreign electricity companies, 2001

Foreign electricity producer	German company	Participation (%)
Sydkraft, SWE	E.ON Energie	60.7
BKW FMB Energie, CHE	E.ON Energie	20.0
ELMÜ, HUN	RWE Plus	55.0
ÉMÁSZ, HUN	RWE Plus	54.0
HKW Wroclaw, POL	EnBW	15.6

Source: VDEW, 2002.

Another means of fostering market openness in the electricity sector is to ensure that third-party supplier can have access to the electricity grid. The terms of grid access are in Germany determined by the Associations' Agreements (see chapter 5), and there have been complaints about the abuse of dominant positions by incumbents. For example, in 1998 the US electricity utility *Enron* appealed to the Bundeskartellamt, complaining about the refusal by the German grid operator *Elektromark* to grant it third-party access. As the result, the Bundeskartellamt launched proceedings against *Elektromark*, but the case was dropped at the beginning of 1999, as *Elektromark* then permitted access to its system.

This case highlighted a potential problem with industry self-regulation in the form of the Associations' Agreements. Third-parties, including foreign companies, that did not participate in the design of the Agreements might experience or merely feel that the rules are tilted against them. In this context, the establishment of an independent regulator will help to increase transparency and accountability and thereby help to avoid any potential discrimination between incumbents and new entrants.

4. CONCLUSIONS AND POLICY OPTIONS FOR REFORM

4.1 General assessment of current strengths and weaknesses

Germany in its present form is a country that has existed for little more than a decade. The integration of Eastern Germany will remain a major task. Managing the newly gained size and socio-economic conditions will henceforth continue to determine the features of the regulatory framework of the country. Another important leitmotif explaining the way the six principles of market openness are applied is the search for unity and diversity at the same time. The "German way" is characterized by a consensus driven approach to regulation despite the federal distribution of power.

From a market openness perspective there remain areas in which particular patterns that foreign actors face may not be adequately addressed. For example the latter find a legal framework varying in detail from Land to Land. In practice this translates into a large volume of legal texts that are usually the result of an important number of consultation mechanisms. In this context it can be a challenge to achieve an overview and participate actively in the on-going creation of the regulatory framework. The density and complexity of the regulatory system have implications when there is need for the drafting of laws and technical regulations and therefore consultations, but are also reflected in the number of institutions with similar responsibilities. To cite an example there are at present 1000 organizations in place that seek to attract FDI. In the area of accreditation there are seventeen different authorities in place that operate in addition to the umbrella association DAR (German Council of Accreditation). Yet, DAR itself does not have the competence to grant accreditation.

As in many other countries the presentation of a position to a consultative body can only be made upon invitation. Since legal texts are only published after they have come into force, it is in the sole responsibility of the respective public body to assure potential stakeholders can express their opinion. The timing and composition of the community invited differs from ministry to ministry and there is no monitoring of these activities.

Although Germany makes substantial efforts to foster transparency by the use of diverse means of communication, foreign stakeholders may need to spend an important amount of time to understand the regulatory framework, the respective responsibilities of the different public institutions and participate in consultations if they are invited.

The exactitude with which the legal framework is applied does not ease moves in the German market and contributes to inflexibility of the regulatory framework, despite contributing to legal predictability. Unfamiliarity with the framework and the approach to its implementation represents a disadvantage for international stakeholders versus domestic parties.

The principle of non-discrimination, as anchored in the constitution, is generally adhered to. In practice it has not been evaluated whether domestic business associations represent foreign interests adequately. Influence of non-domestic stakeholders in these organizations seems critical to ensure equal treatment. In the context of public procurement it may be questioned whether the committee of awarding authorities and contractors (Verdingungsausschuss), a self regulating body consisting mainly of domestic stakeholders, represents adequately interests of non-domestic stakeholders. Furthermore it remains unclear how the country deals with foreign companies that have taken up domestic status, but do need some sort of differentiated treatment given the structure of their business and the fact that they are confronted with different market conditions. Under the assumption that no formal distinction can be made between foreign and domestic stakeholders no need is perceived to conduct Regulatory Impact Assessments related specifically to trade and investment.

Germany is making substantial efforts to facilitate trade. In line with European directives, customs procedures have continuously been eased be it through the use of ICT or simplification procedures. The customs has furthermore increased its focus on risk management.

From an international perspective competition principles provide a strong underpinning to the German regulatory system, with a sound reputation and an international orientation. The Bundeskartellamt (BKA) and the regulator for telecommunication and postal services (RegTP) are both engaged in international co-operation and seek to respond to the increasing internationalization of companies. The "effects" doctrine is applied if a foreign firm operating abroad creates anti-competitive behaviour in Germany. Furthermore BKA and RegTp collaborate with competition authorities abroad to exchange information and share insights.

A similar positive picture can be drawn from the German Institute of Standardisation (DIN). As a technical association DIN is involved in a variety of international activities. So far it has well responded to the role of setting the standards in a country whose manufacturing industry has world-wide importance.

Germany has taken encouraging steps to improve certain aspects of the regulatory framework and has initiated affirmative steps. The country is willing to change and has engaged in promising strategies. Germany has recognized that public procurement offers strong potential for improvement. Improvement areas will possibly include the following points:

European directives have been translated in a contradictory manner. Some newly introduced paragraphs relating to tenders above the EU threshold refer to rules below the threshold. In compliance with EU law a call for a tender is only compulsory if no communality owned company could provide the service. No legal protection exists below the threshold since the regulatory framework is part of the budgetary law. The rules of the committee of awarding authorities and contractors have no legal status since they are generated by the stakeholders themselves. Public Procurement tenders are insufficiently published. The value of contract accounts for approximately 17 per cent of GDP, yet tenders worth less than 1 per cent of GDP are being published in the official Journal of the EU, which minimises competition.

Germany further seeks to improve the co-ordination of different public institutions at the horizontal and vertical level. These structural initiatives aim to reduce duplication and foster co-operation at the federal and Länder level. In this way the current administration seeks to actively manage the federal structure of the country.

Efforts have been made to reduce possible administrative burdens by streamlining measures and establishing one-stop-shops including at the sub-federal level. The government initiative "Modern State-Modern Administration" aims to accompany these initiatives with the necessary management of human resources by possibly introducing incentive schemes and evaluation forms for civil servants.

The recently engaged system of Regulatory Impact Assessment and the increasing tendency towards more flexible modalities might further contribute to the decrease of laws currently in place. In addition Germany aims to devote further resources to its competition authorities and is considering establishing a sector specific regulator for electricity. This would represent a further commitment to international competition.

At the moment it is still too early to assess the impact of these reforms. Opinion polls however show that reforms have broad and firm support in the population and might therefore have a successful and lasting impact since they reflect the sense among the population

4.2 The dynamic view: challenges for future reform

The "Agenda 2010" of the current administration aims for improvement in the areas covered in this report and will very likely have positive consequences on regulatory reform for market openness. To maintain and ensure the quality and pace of the reforms will remain a major challenge.

In addition, the facts identified in this chapter suggest need for reform in the area of transparency and openness of appeal procedures. For the international trade and investment community transparency of rules and regulation might be rendered difficult given the amount and complexity of legal texts. The continuation of efforts to streamline the regulatory framework and offer support to foreigners will remain an important aspect of the agenda. In this way non-domestic stakeholders would find it easier to deal with the exactitude of the application of legal texts in the country.

The country might furthermore reconsider the established practice of publishing legal texts only after they have entered into force and leaving it to the respective authorities to invite potential stakeholders to consultations. Stakeholders that do not get invited do under the present system not have the possibility to raise their voice since information on current drafts is not publicly available.

In the area of public procurement the country might explicitly reconsider the increase of publicly available information on calls for tender through the use of ICT or paper based information. Translation of this information into foreign languages (also for bids below the EU threshold) might increase foreign participation and international competition, setting off transaction costs. Adequate legal protection of bidders, even below the EU threshold, is essential to introduce credible safeguards into the regulatory framework. The Bundeskartellamt (BKA) and the sixteen local cartel offices might assume this role provided they are given the appropriate resources or the task may be entrusted to the adequate administrative level of justice. Further expansion of their competence might increase the quality of public procurement.

Current initiatives to better manage the federal organization of the country might be accompanied by efforts to streamline the activities of the different FDI agencies. This might help to attract additional FDI in the country without demanding additional resources.

It is essential to take the human dimension into consideration when looking at structural reforms of public institutions. Training staff in interacting with business and civil society to adopt a service oriented attitude will help interaction with civil society and the business community. From an international perspective competence in foreign languages is considered a precious value added. To allow a multidisciplinary approach towards regulation that gives adequate recognition of economic dimensions of rules, Germany like other OECD countries might consider attracting and retaining staff with a diverse background. Currently the majority of professional staff in the administration has one particular background which does neither make the establishment of economic thinking nor the adoption of a market openness perspective an obvious task.

Germany could make an important step towards greater market openness in its regulatory framework by addressing trade and investment related aspects in Regulatory Impact Assessments. This policy tool is fairly new to the country. In the context of the further integration of global markets, it would be a lost opportunity to leave the international dimension unaddressed. If the country wishes to avoid additional administrational steps, it might seek to integrate an international view in areas currently under regulatory impact assessment.

4.3 Policy options for consideration

This section identifies avenues for future action. The following recommendations are based on the assessment presented above and the policy recommendations set out in the 1997 OECD Report to Ministers on Regulatory Reform. Founded on international consensus on good regulatory practices and on concrete experiences in OECD countries, they are intended at fine-tuning a regulatory environment, which appears already well oriented towards market openness and adapted to the conditions of a global economy.

- *Manage actively current reform programmes*
  - Focus on implementation of key driving forces of the reform agenda
  - Keep the pace of current reforms
  - Monitor results and provide public recognition to maintain broad support

- *Improve transparency of the regulatory framework*
  - Review and withdraw legal texts that are outdated
  - Simplify legal language
  - Offer foreigners systematic legal support, explanation and information on the distribution of different competencies of respective authorities, perhaps in the form of legal centres

- *Advance openness of decision making*
  - Publish draft regulations at an early stage to offer potential stakeholders the opportunity to gain insight into current debates, possibly by establishing an internet platform or a chat-room which might be cost saving and effective ways to improve access to information
  - Allow potential stakeholders to participate in consultations upon self initiative in addition to invitations
  - Provide advance notice of upcoming consultations to meet the minimum requirement of making self-initiative possible
  - Enhance efforts to include views of foreign participants particularly in cases that affect trade and investment
  - Reduce the overall number of consultations to allow transparency in key debates

- *Foster market openness in public procurement*
  - Increase the percentage of openly advertised public procurement tenders at the EU level
  - Clarify the regulatory framework, abolish contradictory regulations
  - Simplify procedures for public procurement tenders, perhaps by reducing the current variety of procedural options
  - Revise the role of committees of awarding authorities and contractors by allowing new entrants and foreigners full direct access to the body and strengthening their monitoring by the competition authorities
  - Offer adequate legal protection below the threshold
  - By doing so take a frontline position among OECD countries

- *Accelerate efforts to eliminate unnecessary burdens to business*
  - Foster cooperation between the over 1000 FDI agencies by identifying common areas of collaboration
  - Focus on pace and impact of current reforms in the area
  - Continue consulting with stakeholders to identify key areas of improvement

- *Strengthen the administrative capacity for the enforcement of reforms*
    - Reinforce a client oriented culture among "front line civil servants"
    - Offer training programmes to staff in communication, foreign languages, output oriented process management
    - Enhance performance based evaluations
    - Focus on diversity when hiring and retaining excellent staff

- *Introduce a coherent approach to regulatory impact analysis (RIA)*
    - Develop a consistent practice for the assessment of trade and investment effects of proposed regulations
    - Accord greater importance to trade and investment experts in quality checks
    - Profit from the opportunity of leapfrogging by taking "lessons learned" from other countries

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