

PART II*

Regulatory Policies and Outcomes

* The background material used to prepare this report is available on the Web site: www.oecd.org/regreform/backgroundreports.

PART II
Chapter 4

Market Openness*

* For more information see: Background Report on “Enhancing Market Openness through Regulatory Reform” available on the Web site: www.oecd.org/regreform/backgroundreports.

Context and history

Germany's large economy is strongly export-oriented and its trade policies promote market openness

In the European context, Germany's striking feature is its size. It is the world's third largest economy after the US and Japan, the world's second largest exporter of merchandise products, and the largest market in the EU, with a population of 82.3 million and a GDP of EUR 2 269.2 billion in 2001.

It also faces the continuing challenge of adjusting its economy to re-unification. The integration of the new *Länder* has been pursued with the aim of equalising living standards across the country, and this has proved costly. Budgetary transfers to the new *Länder* remain a major burden on public finances and contributed to a government deficit of euros 25.7 billion in 2001. The cost has also been reflected in the evolution of the trade balance. The merchandise trade balance dropped sharply after re-unification, as goods were diverted to the east for reconstruction, and has only recently recovered to pre-unification levels. In 2001, the merchandise trade surplus was about euros 87 billion (roughly 4.5% of GDP). Merchandise trade is largely concentrated on chemicals, manufactured goods, and machinery and transport equipment. These accounted in 2001 for nearly 80% of merchandise exports and were responsible for its surplus in the trade balance (Table 4.1). There is a longstanding deficit in services trade. The main services importing sectors in 2001 were travel, business services and transportation (Table 4.2).

Table 4.1. **Sectoral structure of merchandise trade, 2001**

	Imports		Exports		Balance
	(Million EUR)	%	(Million EUR)	%	(Million EUR)
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.

Table 4.2. **Sectoral structure of services trade, 2001**

	Debits		Credits		Balance
	(Million EUR)	%	(Million EUR)	%	(Million EUR)
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.

Export-oriented economic policies have been an important feature of the social market economy which was developed after the Second World War to put Germany back on its feet. Competition – abroad as well as within Germany – was strongly encouraged. Germany has also worked to promote market integration both within Europe and internationally. Trade policy is closely tied to the EU. Within the EU Germany has promoted an open common external trade policy, whilst the development of the EU single market has led to a reduction in regulatory barriers to trade between EU countries. Trade relationships are strongly anchored within the EU (Table 4.3). Half of all trade is conducted with other EU members.

Table 4.3. **Geographical structure of merchandise trade, 2001**

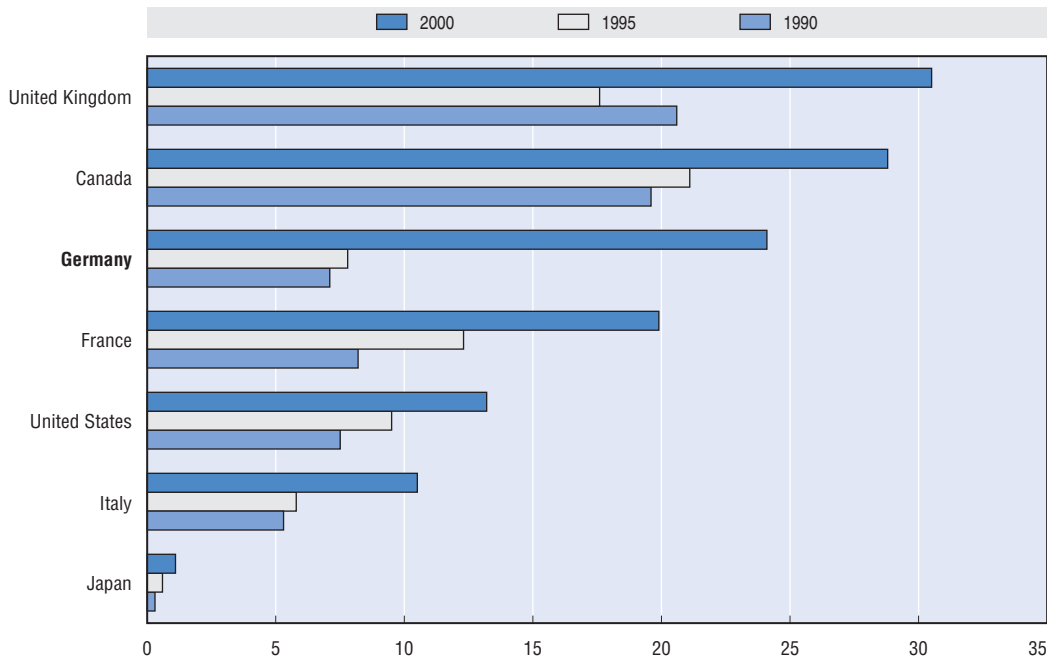
	Imports		Exports		Balance
	(Million EUR)	%	(Million EUR)	%	(Million EUR)
OECD	432 381	78.6	522 020	81.9	89 639
EU-15	274 374	49.9	342 720	53.8	68 346
Non-EU Europe	78 339	14.2	81 100	12.7	2 761
NAFTA	49 946	9.1	76 895	12.1	26 949
Asia and Pacific	29 721	5.4	21 304	3.3	-8 417
Non-OECD	96 959	17.6	99 044	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 and Middle East	5 081	0.9	13 646	2.1	8 565
Asia and 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.

Investment flows are also EU-dominated. Half of all German investment abroad is in the EU, and over 60% of foreign investment in Germany is from other EU countries. Foreign direct investment (FDI) inflows to Germany were relatively low until the mid-1990s, but

have been growing. The ratio of inward FDI to GDP remains lower than for the UK and Canada, but higher than for other large OECD countries (Figure 4.1). The scale of recent FDI has been boosted by some large transactions (including the Mannesman takeover by Vodafone Airtouch). The three core manufacturing sectors of 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 (over 80% inward and over 70% outward in 1999) is undertaken in the services sector. Outward FDI stocks exceed inward FDI stocks by nearly 40%.

Figure 4.1. **Inward stocks of FDI as a share of GDP in selected OECD countries**



Source: OECD.

The consensus-based approach to decision-making and extensive regulation make a challenging environment for outsiders

The governance system is also characterised by a constant search for consensus in decision-making, and especially, intensive consultation with unions and business associations. This, together with the extent of regulation, can be a demanding environment for foreigners in their efforts to understand the German framework. Time and resources may be needed to come to grips with it. An initiative to promote greater efficiency in governance – “Modern State – Modern Administration” – was launched in 1999. The “Agenda 2010” reform programme is a more ambitious and comprehensive initiative to promote structural and regulatory reforms, which has considerable potential for fostering market openness.

The policy framework for market openness: the six efficient regulation principles

As tariff barriers to trade have fallen, the impact of domestic regulation on international trade and investment has become more important. In a global economy,

regulations need to be market-oriented and friendly toward trade and investment. The 1997 OECD *report on regulatory reform* identified six “efficient regulation principles” for building these market openness qualities into regulations. These are reviewed below.

1. Transparency: the nature of Germany’s governance system generates some difficulties, especially with public procurement.

Market openness requires that all market participants be fully aware of regulatory requirements so that they can base their decisions to invest, produce and trade on an accurate assessment of likely costs, risks, and benefits. This is especially important for foreign firms, which have to cope with differences in the business environment, such as language and business practices. Transparency requires access to information on regulations and openness of the rule-making process through public consultation. The handling of public procurement is an important aspect of transparency.

Despite big efforts to promote transparency, the amount and complexity of Germany’s regulations, its federal structure, and its consensus-driven approach to rule-making constitute a challenge for foreigners. For example, consensus-seeking drives a large number of consultation mechanisms, and the tax law is very complex.

Access to information. The context is important here. Most government officials and business and consumer representatives have a legal background, and extensive regulation is an integral part of Germany’s approach to governance. At the same time, there is a solid framework for making rules available to all. Any legally binding text must be published in the Federal Law Gazette, which can also be accessed via the Internet. Laws must be published before they enter into force, but not drafts. Thus, information on legal texts only becomes available after the committee involved has come to a consensus or reached a decision by a vote. This inevitably puts outsiders to the consultation mechanisms at a disadvantage. The Agenda 2010 programme and the Master Plan promise to tackle the amount of regulation, explicitly promoting the abolition of unnecessary rules and the use of alternatives to regulation.

Consultation mechanisms. Rule-making is characterised by intensive co-ordination and consensus-building, generally involving established groups such as trade unions, business associations, NGOs and consumer groups. A consensus with a majority of the *Länder* is necessary if their interests are affected. The responsible ministry decides who to consult and approaches vary. This contrasts with the open “notice-and-comment” practice of most OECD countries. A federal manual on legal drafting and assessment of regulatory impacts sets out the procedures. The interests of foreign stakeholders are generally expressed through professional associations, such as the Federal Association of German Industry (BDI). In principle therefore, foreigners have the same opportunities for comment as others, and there are no special arrangements for them. But the need to belong to these associations may *de facto* exclude foreign interests from the consultation process.

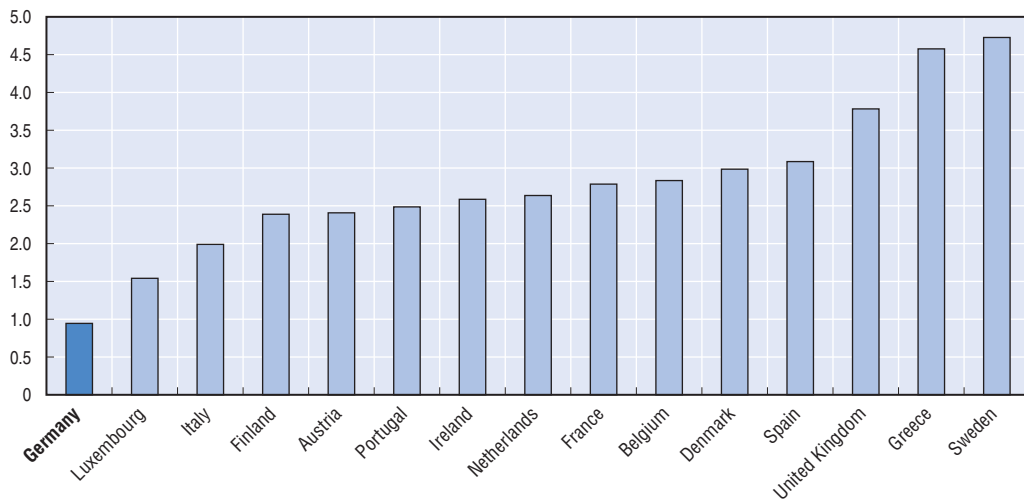
Openness of appeal procedures. No distinction is made between foreign and domestic interests. The rules provide for complete legal redress against acts of the State (part of the Basic Law).

Transparency of technical regulations and standards. The German Institute for Standardisation (DIN), a non-governmental technical association, is responsible for voluntary technical standards. There are a huge number of standards and committees (some 83 committees and 4 100 working parties in 2002). DIN follows standards-making

guidelines which require consensus-based decision-making, and is responsible for identifying relevant stakeholders. Decisions are made public once a consensus has been reached, which can take several years. This is done through DIN's Web site among other means. The scale and length of the standards-making process can be daunting for SMEs. DIN also maintains the German Information Centre for technical rules (DIETR), and publicly accessible standards collections in wall major German cities. To help foreigners it makes an effort to publish in other languages.

Public procurement. Calls for public procurement published at the EU level are the lowest in the EU, accounting for slightly less than 1% of GDP, compared with an estimated total contract value of just over 17% of GDP (Figure 4.2).

Figure 4.2. **Openly advertised public procurement as advertised in the Official Journal of the European Union, 2001**



Source: OECD.

Part of the reason is that a large number of procurement contracts fall below the EU threshold for publication: contracts are deliberately split up to make bidding by SMEs easier, but the fact that such contracts are not then published at the EU level makes it harder for foreigners to learn of opportunities (the contracts are however published domestically). Foreigners face further difficulties in that the German public procurement legal framework is extremely complex. As in most other EU countries, EU directives are implemented in such a way that EU and national law coexist: above a certain contract value EU law applies, and below it national law applies, which can vary between the seventeen *Länder*. The level of the EU threshold varies by type of procurement. Also, EU legislation has been integrated into a Web of different German laws and rules – the competition law, the ordinance on public procurement, and the procurement codes. In line with EU law, a tender can be avoided if a public company can provide the good or service. This is also unhelpful for international competition. Box 4.1 sets out EU rules on procurement. Legal protections for bidders vary according to the value of the contract. Above the EU threshold every domestic or foreign bidder can appeal to the public procurement tribunals. Some EU law has been implemented by reference to existing national law. This is unique in the German legal system and has led to a lack of legal transparency.

Box 4.1. EU rules on procurement

Public procurement in the European Union accounted for 11% of GDP of the EU in 1996. Before common directives were passed at the European level not more than 2% of public tenders were attributed to foreign firms. Within the OECD countries it accounted for 20% 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 EU 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 EU 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: EU Commission.

Procedures present another challenge. Committees create the procurement codes. These, part of the self-regulation tradition and operating by consensus, are made up of federal and *Länder* representatives and business associations representing important domestic clients. So the foreign and indeed any third party perspective is lacking. Tender procedures can follow six different modes, as prescribed in the procurement codes. Apart from the public or open procedure, all the other procedures involve a restricted group of bidders chosen beforehand by competition. Box 4.2 sets out Germany's general principles for public procurement.

2. Non-discrimination: Germany has promoted this for a long time; current policy is anchored in its membership of the EU and WTO.

The application of the non-discrimination principle in regulation, through most-favoured nation treatment (MFN) under which all firms are treated the same, and national treatment (NT) under which foreign firms are treated the same as domestic firms, aims to provide equal competitive opportunities irrespective of the origin of products or services and so maximise efficient competition.

Germany's policy is anchored in its membership of the WTO and the EU. It therefore has obligations to ensure compliance of its domestic regulations with the MFN and NT principles, but is also proud to have started this process from the beginning of the last century. It has one Germany-specific exception to MFN, related to ships' personnel. It also, as an EU member, adheres to the EU-wide list of exemptions to MFN treatment in the GATS, the schedules of commitments to market access, and national treatment.

Preferential agreements give more favourable treatment to specified countries and are thus inherent departures from the MFN principle. Germany's policy is an integral part of EU policy which, notably, includes the creation of the EU's Single Market. Though the Single Market has drawn criticism from trading partners outside the EU, efforts have been made to keep the process open and to apply regional policies on an MFN basis. A number of preferential agreements have been concluded by the EU: with EFTA countries, with central and eastern European and Mediterranean countries, and also with developing countries. There are number of safeguards for third parties in this process, including a review by the EU Council of Ministers of compatibility with WTO rules, and the WTO's dispute settlement mechanism.

3. Avoiding unnecessary trade restrictiveness: awareness of this is high and significant measures are being taken.

Where possible regulators should favour measures that have the least restrictive effects on trade. For example taxes might be used instead of regulations to achieve the same policy goal. Mechanisms need to be put into place to give effect to the principle, including *ex ante* assessment of the impact of proposed regulations on trade and investment, reviewing them after a certain time, streamlining procedures, effective consultation of foreign interests, and access to a dispute settlement procedure. In short, a business-friendly environment needs to be created which extends to foreigners as well as domestic interests.

Impact of regulations on trade. Efforts to assess the impact of regulations do not explicitly consider trade and investment issues (the impact of domestic regulations on trade, and the impact of trade regulations on trade). The consensus-driven approach to rule-making has some advantages in this context, as it should help to identify a wide range of potential effects of proposed rules (though not necessarily those affecting outsiders to the process). *Ex post* evaluation of the impact of rules is equally important. Chapter 2 gives more detail on these issues.

Box 4.2. 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 which prevail over the negotiated procedure and the single tender action. Once a rule of procedure has been chosen it cannot 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 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. The 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 have been laid down by the committees of awarding authorities and contractors. In general, decisions have to be taken by consensus. 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 fall outside the competence of the committee of awarding authorities and contractors, which can therefore not draft regulations in that domain.

Principle of budget law

Decisions made by consensus within the committees of awarding authorities and contractors below the EU threshold are 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 produce decisions that reflect the general framework of 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).

Administrative burdens on business. In principle foreigners face the same issues and potential difficulties as domestic firms in dealing with the German administration. In practice they may find it harder, confronted with the particular thoroughness of the German approach, the extent of regulations, and the complex federal-*länder* legal architecture and division of responsibilities. Legal predictability is, however, a strong point. The federal government recognises a general need for improvement. It has given priority to reducing the administrative burden in its “*Modern State – Modern Administration*” programme and its “*Agenda 2010*”. This includes a new division named “controlling bureaucracy” in the Federal Ministry of Economics and Labour (BMWA), expanding the use of online procedures, and one stop shops to improve the interface between firms and local authorities. Some special support to foreign investors is also provided by FDI agencies whose objective is to encourage FDI. There is a large number of these agencies at the federal, *Länder* and local levels (about 1 000 in total), but they tend to operate largely independently, which can lead to duplication of promotional effort.

Customs procedures. Customs procedures attract growing attention, now that tariff barriers in OECD countries are low or non-existent. They can represent a significant cost to business. Steps have been taken in Germany to address this. Risk management can help to expedite trade whilst protecting a country’s interests, and a centralised institution for risk analysis (ZORA) helps the customs service. Germany supports the EU Common Customs Code aimed at simplification of customs procedures, and expects to ratify (with the EU) a new simplification convention under the World Customs Organisation. An important e-customs initiative is being taken forward, the Tariff and Local Customs Procedure (ATLAS), which will replace currently isolated IT systems and whose ultimate aim is to make procedures paperless. Traders will be able to initiate customs declarations from their home base. German customs authorities also regularly meet business associations to promote dialogue, among other trade facilitation measures.

4. Use of internationally harmonised measures: Germany’s strong international trade orientation includes active involvement in the international standards-making process.

Compliance with different national regulations and standards can make the cost of operating in different markets significant, even prohibitive, a major issue raised by the international business community. Internationally harmonised standards offer a solution, and their use has gained prominence with the WTO Technical Barriers to Trade (TBT) agreement. This encourages countries to base their technical requirements on international standards where these exist. The reduction of standards-related barriers to trade within the Single Market has also been a high priority, and is reflected in the “*New Approach*” to technical harmonisation, under which regulation is limited to defining essential requirements, not detailed technical specifications. In practice this means that the development of standards is left to European standardisation bodies, and their use is not mandatory, although they provide a presumption of conformity.

The international environment for standardisation now provides a strong guiding framework for national standards. Thus European and German national standards are increasingly transpositions of international standards produced by international standardisation organisations such as ISO, IEC, and ITU. The EU Commission mandates standardisation work within this context. Completion of the EU internal market has promoted the development of European standards under the “*New Approach*”. Germany’s

standardisation work is done in close co-operation with international and especially EU standardisation bodies, as well as with industry and consumer representatives. 75% of standards published in Germany are developed internationally, and the number of national standards has continuously decreased.

DIN is the cornerstone of the German standardisation work and a key player in Germany's policy of promoting international trade. It is a member of the International Organisation for Standardisation (ISO) and it promotes the adoption of standards harmonised at the EU and international level. As a private institution it has voluntary membership and participants usually contribute to its costs. DIN standards have to be purchased and this provides its main funding. When DIN adopts European or international standards it withdraws all conflicting national standards. It can also choose not to adopt a European standard if it sees no need for a standard in Germany. National standards cover areas where international standards are not yet available (notably, construction materials, services, special test methods for food products and special types of plugs). DIN also co-operates technically (for example through training) with developing countries, which helps these countries to improve their capacity to export to the German market.

International and DIN standards are publicly available, including electronically. Public procurement tenders are legally bound to require European standards, where these exist.

5. Recognition of the equivalence of regulatory measures adopted by foreign countries: the approach is embedded within the EU framework.

Where international standards are not available, trading partners can mutually agree to accept their standards as equivalent. The existence of differing national standards and the need to use differing national procedures for assessing conformity adds to the costs of producers wishing to sell in different markets. Mutual Recognition Agreements (MRAs), which can cover the standards themselves or the procedures used to assess conformity, can help to reduce these costs. Mutual recognition activities are often left to the private sector so as to ensure that the work is relevant to the needs of evolving markets.

Here too Germany's work is intertwined with that of the EU, in the context of developing the Single Market. As regards EU MRAs, these function well, according to the EU Commission, where products do not raise security issues (for example bicycles). But there is room for improvement for more technically complex products and those that pose a potential hazard for health or the environment. MRAs have also been promoted by the EU with those third countries that have a comparable level of technical development and comparable approaches to conformity assessment. MRAs have been concluded so far with Australia, New Zealand, Canada, Israel, Japan and the USA (Table 4.4).

A special type of MRA (PECA) has also been established by the EU for the ten countries which are expected to accede to the EU in 2004. These serve as a tool to foster the countries' integration.

Mutual recognition is critically dependent on robust and agreed methods of accreditation (the procedure by which a third party formally recognises entities for the performance of conformity assessment). Accreditation in Germany is through a group of bodies that are members of the German Council of Accreditation (DAR), a working group of the federal government, the *Länder* and the business community. DAR co-ordinates their work and represents them internationally.

Table 4.4. MRAs concluded or under negotiation by the EU

	Mutual Recognition Agreements							PECAs ⁴								
	Australia	New Zealand	United States	Canada	Israel	Japan	Switzerland	Czech Republic	Hungary	Estonia	Latvia	Lithuania	Slovakia	Slovenia	Malta	Poland
Construction plant and equipment								N		N	✓					
Chemical GLP ¹						✓		N								
Pharmaceutical GMP ²	✓	✓	✓	✓		✓	✓	N		N	N					
Pharmaceutical GLP ¹			N		✓		✓			N	N					
Medical devices	✓	✓	✓	✓			✓	✓	✓							
Veterinary medicinal products								N								
Low voltage electrical equipment	✓	✓					✓	N	N	✓	N					N
Electromagnetic compatibility	✓	✓	✓	✓			✓	✓	✓	N	N	✓	N	N	N	N
Telecom terminal equipment	✓	✓	✓	✓		✓	✓	✓		N					N	N
Pressure equipment	✓	✓ ^{N3}					✓	✓	N	N	N					N
Equipment and systems used in explosive atmosphere							✓	N								
Fasteners																
Gas appliances and boilers							✓	✓	✓	N				N		N
Machinery	✓	✓					✓	✓	N	N	N	✓	N	N	N	N
Measuring instruments																
Aircraft								N								
Agricultural and 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.

1. Good Laboratory Practices.

2. Good Manufacturing Practices.

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

4. 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 to the EU Commission expressing their intention to open negotiations on PECAs.

Source: EU Commission, DG Trade.

6. Application of competition principles from an international perspective: a robust and outward-looking competition law and authority is an asset for foreigners.

The benefits of market access can be reduced if anti-competitive conduct is not addressed. From an international perspective, the important issues are commitment to competition principles in law and policy, and the existence of open and effective procedures for hearing and deciding complaints over market access.

Germany starts from a general principle embedded within the social market economy: maintaining a balance between fairness and efficiency, with a strong emphasis on competition (internal and external) as a driving force for the economy. Chapter 3 gives more details of the competition law framework. In brief, the German competition law has strong rules for dealing with anti-competitive behaviour, notably the abuse of dominance and cartels, backed up by a strong and respected competition authority (the BKartA) as well as *Länder* level authorities. Enforcement rules and appeal processes are well designed. EU competition law is also highly relevant. There is a sector regulator for posts and telecommunications, which seeks to control abusive practices by the former incumbent telecommunications and postal monopolies and to help new market entrants. The Federal Railway Office regulates the railways and a new electricity/gas regulator will be set up. The German competition law contains a broad “effects” test. If a firm operating abroad creates anti-competitive behaviour on the German market, the German competition authorities can intervene. (But if a firm operating in Germany has effects abroad it is perceived to be beyond the competence of the German authorities.)

These arrangements are helpful for international as well domestic firms. The BKartA makes special efforts to ensure that its procedures are transparent and accessible to non-German speakers. It also co-operates with other competition authorities, for example in merger cases with the relevant authorities in the UK and US). It has agreed, together with members of the European Competition Authorities (ECA) to share non-confidential information. The telecommunications and posts regulator also promotes co-operation and information-sharing. Bilateral and multilateral agreements complement the picture. The former involve Austria, Yugoslavia, Germany and France.

Market openness and regulation in selected sectors

International market openness and the six efficient regulation principles can also be assessed by looking at key domestic sectoral regulatory regimes: how well do these square up? A factor of growing importance for many sectors is the EU regulatory framework. In some cases this is now the main reference point, so regulatory quality needs to be assessed at the EU level. The rules are, however, designed through a process involving the EU member States, which are also responsible (in the case of directives) for transposing them into national law. Dissemination of information on the rules and enforcement are also the responsibility of member States. EU rules are of considerable importance in the four sectors reviewed below.

The automobile sector is becoming more open through harmonisation of regulations and the new EU-wide car market competition rules

The automobiles sector has traditionally been the source of considerable global trade tension, because of its dynamism and the interventionist policies of some governments. Automobiles remain among the most highly regulated products in the world (safety, energy conservation and protection of the environment are the main regulatory targets) with divergent national approaches to these issues.

The industry is of considerable importance in Germany, accounting for about 17% of manufacturing turnover in 2001. It is highly export-oriented, with almost 70% of production exported in 2001. The industry is also well established abroad through foreign subsidiaries, whose production reached some three quarters of domestic production in 2001. Outward FDI in this sector is about four times larger than inward FDI, though big foreign firms including Ford and General Motors maintain major production sites in Germany.

The EU regulatory framework dominates the picture. Some 165 EU directives lay down the detailed technical requirements for motor vehicles. National approval procedures for the certification of passenger cars and motorcycles were replaced in the late 1990s by a mandatory EU-wide approval system. This works through approved national test centres.

Despite this progress, the EU automobile market remains far from open. Price differentials between countries remain significant. German car producers have been fined by the EU Commission several times for pursuing discriminatory pricing policies in different national markets. In 1998 the EU Commission fined Volkswagen euros 102 million for a policy of refusing to sell cars in Italy to foreign buyers. Moreover in 2001 the EU Commission imposed a fine of nearly 72 million euros on Daimler-Chrysler for infringing the EU competition rules in the area of car distribution, as the company had impeded parallel trade in cars and limited competition in the lease and sale of motor vehicles. A new EU regulation in 2002 on vertical agreements and concerted practices in the motor vehicle sector seeks to address the problems, notably by fostering competition between dealers. In the case of concerns about anti-competitive practices both domestic and foreign companies can have recourse to the German legal system.

The UN-ECE (United Nations Economic Commission for Europe) plays a major role at the international level in the harmonisation of the regulatory framework for the automobile sector. The relevant working party has become the *de facto* global forum for the international harmonisation of technical standards for motor vehicles. Germany participates in this work through the EU.

The EU framework for telecommunications equipment liberalisation is developing well

Germany's trade in telecommunications equipment was roughly balanced in 2001, with imports and exports each amounting to about euros 21 billion. Here too regulation is largely at the EU level. The main framework currently consists of two "New Approach" directives, but is due to be replaced from July 2003 by a new, more comprehensive framework (Chapter 6 gives more details). Germany participates in the activities of the European Telecommunications Standards Institute (ETSI) and other international standardisation bodies through the German Committee for Electronical, Electronic and Information Technologies (DKE).

Telecommunications services liberalisation, where Germany has a trade deficit, is also underway

Germany is a net importer of telecommunications services, and the trade deficit has increased over time. The market was fully opened to competition in 1998 in line with EU rules, but the ex-monopoly incumbent is still strong and further work is needed to promote effective competition. Chapter 6 gives more details. There are no formal restrictions on the activities of foreign companies, who have the same recourse to the German legal system as domestic companies in case of dispute.

The current German regulation of electricity markets raises problems for foreigners as well as domestic firms

Chapter 5 gives more details on the German electricity market and current regulatory issues. Germany has completely liberalised its market and two of the four major groups in the German electricity market are controlled by foreign companies. Germany trades electricity widely with nearly all the countries on its land borders and beyond, and trade amounts to about 10% of domestic consumption. However, there have been complaints concerning the terms of access to the grid. Third parties, including foreign companies, that did not participate in the design of the industry-led Associations Agreements may be at a disadvantage. In this context, one advantage of the proposed establishment of an independent regulator will be to increase transparency and accountability and so avoid any potential discrimination between incumbents and new entrants.

Conclusion

Germany has a strong and distinctive governance framework which evolved as part of the social market economy after the war. The framework encompasses both unity and diversity through the Federal-Länder relationship, and co-operation as well as competition. The search for consensus through extensive consultation is a cornerstone of decision-making, and pervasive, carefully applied regulation permeates the landscape. Germany is also a major exporting country which has long attached importance to the promotion of an open trading environment.

Some of these features are very helpful for market openness; others less so. The well-designed competition law and effective competition authority help to provide a sound trading environment for foreign as well as domestic firms. The legal framework and its application are highly predictable. The principle of non-discrimination is anchored in the Constitution. Considerable efforts are made to facilitate international trade, which include the streamlining of customs procedures and the work of the standards institute (DIN) across international fora to promote international standards and other trade-facilitating measures. Internal reform measures to reduce administrative burdens, improve regulatory tools such as RIA, and better manage the Federal/Länder relationships, as well as the efforts to find the right regulatory framework for competition in the network industries, will also help outsiders.

There is a considerable will to promote fairness and avoid discrimination, but Germany's governance framework by its very nature can feel closed and difficult from an outsider's perspective, even if this is not deliberate. The consensus-based and often lengthy decision-making process which precedes the making of new rules usually involves established stakeholders. Public procurement is an especially closed process and the government recognises the need for improvement. The extent of regulation, the precision with which it is applied, and its complexity are other difficulties faced by outsiders. There is scope for the current reform initiatives to do a great deal of good for market openness.

Policy options for consideration

1. Actively manage current reform programmes.

The current reform programmes should focus on the implementation of key issues on the reform agenda; the momentum should be sustained; reform results should be monitored; and the public should be kept informed to maintain broad support.

2. Improve transparency of the regulatory framework.

For the international trade and investment community, transparency of rules can be difficult given the amount and complexity of legal texts. Improving transparency should focus on:

- reviewing and withdrawing legal texts that are outdated;
- simplifying legal language; and
- offering foreigners legal information and explanation of German laws and regulations, and on the distribution of different competencies of the different authorities.

3. Promote openness of decision-making.

The current 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, should be reconsidered. Outsiders who are not invited under the present system have no means of making their views heard, as information on draft legal texts is not publicly available. Measures to consider are:

- 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: these might be cheap and effective ways to improve access to information;
- allow potential stakeholders to participate in consultations on their own initiative, in addition to invitations, and provide advance notice of upcoming consultations to make this possible;
- enhance efforts to include the views of foreigners, particularly in cases that affect trade and investment.

4. Foster market openness in public procurement.

Despite the size of its economy and policies to promote an open trading environment, Germany is not at the forefront of EU work to promote greater openness in this area. In fact, it has the lowest number of public procurement tenders openly advertised at the EU level. Measures to consider, which would put Germany in the reform frontline among OECD countries, are:

- increase the percentage of openly advertised public procurement tenders at the EU level;
- clarify the regulatory framework and 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 and direct access to these bodies, and by strengthening their monitoring by the competition authorities;
- offer adequate legal protection below the EU threshold.

5. Accelerate efforts to eliminate unnecessary burdens on business.

This is an area where reform efforts are already underway. Measures could be taken to foster co-operation between the numerous FDI agencies by identifying common areas of collaboration. A strong focus should be maintained in the pace and impact of current

reforms in this area. And the government should sustain its efforts to consult with all stakeholders to identify key areas of improvement.

6. Strengthen administrative capacity for the enforcement of reforms.

The human dimension is an essential element in the reform of public institutions for all OECD countries. The staff of public institutions need a service-oriented attitude that seeks to help the business community. Competence in foreign languages is a precious value-added from an international perspective. As well, Germany should consider attracting staff from a diverse background. Currently most staff in the administration have a legal background, which does not especially encourage economic thinking or the adoption of a market openness perspective. The following measures could be considered:

- reinforce a client-oriented culture among “front line” civil servants;
- offer training programmes to staff in communication, foreign languages, and outcome-oriented management;
- enhance performance-based evaluation;
- focus on diversity when hiring and retaining staff.

7. Introduce a coherent approach to Regulatory Impact Analysis (RIA).

An important step toward greater market openness could be taken by addressing trade and investment-related issues in Regulatory Impact Assessments. Germany should consider:

- developing a consistent practice for the assessment of trade and investment effects of proposed regulations;
- according greater importance to trade and investment experts in quality checks; and
- taking advantage of the opportunity to leapfrog through “lessons learnt” from other countries.

APPENDIX

Appendix Tables

Table A.1. **Sectoral regulatory reform in Germany**

Industry	Key legislation/regulatory framework	Regulation on prices	Regulation of entry and exit	Other regulations	Remaining regulations on prices, entry, exit	Other remaining regulations
Telecommunications	Fully open to competition since 1.1.1998. Competition-oriented regulation in principle covers all telecommunications markets.	Sector regulator (RegTP) controls the market on <i>ex ante</i> and <i>ex post</i> basis.	Free entry and exit. (Proof of reliability and professional qualification); access regulation (interconnection, essential services).	Carrier-selection and pre-selection for local calls introduced by law since 1.12.2002, implementation of CbC 1.5.2003, pre-selection in summer.		Universal service obligation exists but without practical impact.
Electric power	Market liberalised in 1998. All customers free to choose supplier. Conditions for network access determined by Associations Agreements. <i>Ex post</i> control through BKartA/courts. Introduction of regulatory authority planned.	No <i>ex ante</i> regulation. Abuse control by BKartA/courts on the basis of competition law and/or the Act Against Unfair Competition. Tariff approval (small consumers via low voltage electricity networks) by State agencies (relevant for retailers, who are also entitled to special contracts).	Supply of electricity does require specific approval (however, specific activities are not included); reasons for non-approval are legally fixed. No specific regulations for exit.	Minimum quotas for "green" electricity purchased at regulated prices, compensated by fee on some consumers.		Universal service obligation exists but without practical impact.
Natural gas	Market liberalised in 1998. All customers free to choose supplier. Conditions for network access determined by Associations Agreements with quasi legal status. <i>Ex post</i> control through BKartA/courts. Introduction of regulatory authority planned.	No <i>ex ante</i> regulation. Abuse control by BKartA/courts on the basis of competition law and/or of the Act Against Unfair Competition.	Supply of natural gas does require particular approval (however, specific activities are not included); causes of decline for approval are legally fixed. No specific regulations for exit.	Notification of long-term natural gas supply contracts (longer than 2 years).		Universal service obligation exists but without practical impact.
Insurance and banking	Liberalisation of insurance market in 1994. Abolishment of insurance monopolies and <i>ex ante</i> control of insurance products. Phasing out of State guarantees for State-owned banks by 2005.	None.	Comprehensive licensing requirements and on-going financial supervision in compliance with globally accepted core principles including minimum capital requirements and professional qualifications. Supervisory powers include withdraw of licence.	On-going financial supervision in compliance with globally accepted core principles. New Federal Financial Supervisory Authority effective 1 May 2002 for banking, insurance, securities/asset management supervision with involvement of the Central Bank in the on-going supervision of banks.		Some agreements among health insurance funds are not covered by the competition law.

Table A.1. Sectoral regulatory reform in Germany (cont.)

Industry	Key legislation/regulatory framework	Regulation on prices	Regulation of entry and exit	Other regulations	Remaining regulations on prices, entry, exit	Other remaining regulations
Railways	State monopoly transformed into joint stock company in 1994. Partial unbundling of infrastructure and train services in 1999. Currently guidelines of EU (first railway package) and results of task force of government “Future of railways” are put into practice.	Supervision by Federal Railway Office (mainly technical issues and track access and abuse control by BKartA <i>ex post</i> i.e., prices for track access).	Proof of professional qualification. Free entry and exit.			
Air transport	National carrier privatised in 1997.	Unregulated pricing subject to abuse control by BKartA <i>ex post</i> .	Free entry and exit within EU.	Bilateral treaties on air traffic.		
Road transport	Partly liberalised market for occasional bus services; abolition of contingents for freight transport in 1998.	Prices fixed by the operator of regular bus services (approved by competent authority) and occasional bus services; prices for taxi services fixed by competent local authority. Liberalisation of freight rates in 1994 for road haulage.	Proof of professional qualification, financial and personal liability for carriage of passengers and road haulage. Restricted entry for taxi services.			
Postal services	In 1989 the integrated post and telecom operator was transformed into three enterprises (telecom, post, and bank); transformation into joint stock companies in 1995 with partial privatisation afterwards. Partial monopoly rights (to date for letters up to 100 g) were granted in return for universal service obligations; market opening for letter above 100 g and outgoing letters to foreign destinations.	RegTP is regulator and supervises price setting of dominant carrier(s) (letters <i>ex ante</i> regulation; other postal services <i>ex post</i> regulation).	Entry for the delivery of letter post items up to 1 kg is subject to a licence (licences are not restricted, except for the exclusive right area, now set at below 100 g). Some competition for Deutsche Post AG for letter services with added value. Free entry and exit for parcel and courier services where many companies entered the market long ago.			

Table A.1. **Sectoral regulatory reform in Germany** (cont.)

Industry	Key legislation/regulatory framework	Regulation on prices	Regulation of entry and exit	Other regulations	Remaining regulations on prices, entry, exit	Other remaining regulations
Pharmacy	Regulated sector.	Uniform prices for drugs that may only be sold by pharmacies (including prescription-only drugs).	Proof of professional qualification and citizen of a European Union State. Free exit and limited entry as neither pharmacy chains nor non-pharmacist owners are permitted.	Pharmacies restricted in products that may be carried; some restrictions on advertising. Subject to retail restrictions on opening hours, with modifications.		
Retail sector	The Gifts Ordinance and the Discounts Act were lifted on 31 July 2001. Opening hours recently further liberalised (takes effect from 1 June 2003). Act against Unfair Competition to be revised: regulation of special sales to be abolished.	Ordinance on proper price quotation. Act against Restraints on Competition forbids sales below purchase costs.	Free entry and exit; notification in register of companies and register of commerce. Construction license demanded outside town centers, even if change of use of an existing building for retail is intended.	Some locations are exempted from opening hours limit (gas station, railway stations). Ordinance on Packaging requires outlets to charge deposit for certain types of packaging and to recollect used packaging.		

Source: OECD.

Table A.2. **Potential impacts of regulatory reform in Germany**

Industry	Industry structure and competition	Impact on output, price, and relative prices	Impact on service quality, reliability and universal service	Impact on sectoral wages and employment	Efficiency: productivity and costs
Telecommunications	State monopoly in long distance and international services replaced by competition, mostly local monopolies in local connections, but some competition is developing.	Significant decline of prices for long distance and international calls, some decline for local calls.	More freedom of choice for customer.	Positive employment effects (since 1998).	Acceleration of productivity and declining unit costs.
Electric power	Regional legal monopolies replaced by oligopoly. Entry mostly on retail level and for renewables.	Prices have decreased, in particular for industrial customers.	More freedom of choice for customers, but relatively low rate of switching in reality. However, many customers have renegotiated prices.		Higher level of productivity.
Natural gas	Regional legal monopolies replaced by oligopoly at retail level, duopoly remains at import level and generally monopoly in transport.	Prices have developed in line with prices in other European countries. No relative decline.	More freedom of choice for customer; customers have renegotiated prices. However very low rate of switching in reality.	Wages still above average; employment decreased.	Increase in productivity.
Insurance and banking	Competitive market, with trend towards consolidation and mergers.		Improvement of service level due to ICT applications.	Negative employment effects.	Increase in productivity.
Railways	Increasing intramodal competition in the freight market; increasing competition for the provision of (subsidised) local passenger services; beginning intramodal competition for long distance passenger services.	Output by and large constant in the freight market with probably declining prices and declining market share of rail transport; output increase for local services even prior to public tenders, with partially shrinking subsidies per train kilometre; output by and large constant in the market for long distance passenger services. Successful entry of one competitor.	Improvement of service level due to ICT applications. Service level is generally good, so is reliability. Significant improvements of service level for local services.	Negative employment effects.	Increase of productivity.
Air transport	Competitive market.	Decreasing prices and new entry of several carriers.	Service level is good, as well as reliability.		
Road transport	Many small suppliers. Competitive market for road haulage.	Decreasing prices.			
Postal services	Partial monopoly.	Prices slightly falling in real terms.	Limited choice for customer, apart from courier services.	Decreasing employment.	Productivity increase.
Pharmacy	Potentially competitive.				
Retail sector	Competitive market.		Increased service level due to liberalised opening hours.		

Source: OECD.

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