Ex-post assessment of regulation: Practices and lessons from OECD countries

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BETTER POLICIES FOR BETTER LIVES

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Foreword

Countries across the world have invested time and resources in the design and the implementation of a sound regulatory policy with the objective to improve their development and the life quality of their citizens. The *ex post* evaluation is the last element of the regulatory governance cycle promoted by the OECD and implemented in their different stages by most of member countries. In fact, the OECD countries have started implementing *ex post* instruments as *one-in*, *x-out* policies and *sunset* clauses in their regulation to incentivise the evaluation of regulation. At the same time, countries have developed some exercises to evaluate their policies across sector but except of few examples such practices are still no standardized. Thus, still there is much to learn about *ex post* evaluation methodologies, practices and results.

The relevance of the *ex post* evaluation relies in which such tool provides information about the quality of regulation and the capacity to achieve the objectives and goals it was designed for. Thus, an *ex post* regulatory policy supports that regulation evolves along with the challenges that bring the technology and the society as whole.

This report aims to increase the knowledge and experiences of OECD member and non-members on *ex post* evaluation, so they can improve the implementation of their policy. At the same time, the report pretends to establish a milestone of the future work of the OECD about the regulatory policy.

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The present report is part of the "Agreement between the Ministry of Economy of the United Mexican States and the Organisation for Economic Co-operation and Development for the Purpose of Strengthening Competitiveness through Regulatory Policy and Governance".

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Regulatory Policy and ex post assessment of regulation

This chapter presents ex post reviews of regulation as part of the regulatory policy cycle and how these assessments interact with other elements of the cycle. Given that ex post reviews are the weakest links of the regulatory cycle, principles that should govern ex post evaluations are introduced as well as approaches that governments can follow to promote their use.

The 'stock' of regulation is extensive in all countries, typically having accumulated over many years, and its effects across the community and economy can be pervasive. While much of this regulatory stock yields important benefits, its effectiveness will vary and costs can sometimes be greater than necessary to achieve a policy objective.

The potential for regulation to have significant impacts — whether positive or negative — necessitates it being carefully assessed before implementation. While this is now generally recognised and regulatory impact assessment processes have become increasingly common, past assessments may not always have been adequate, or undertaken at all (OECD, 2015[1]).

Even where regulations are rigorously tested before being introduced, not all of their effects can be known with certainty. The regulatory endeavour is essentially experimental in nature, depending to some extent on judgments about causal relationships and responses.

Importantly, regulations that are properly assessed and well designed, and thus deemed fit for purpose initially, need not remain so. Markets change; technologies advance and preferences, values and behaviours within societies evolve. Moreover, the very accumulation of regulations over time can lead to interactions that exacerbate costs or reduce benefits, or have other unintended consequences.

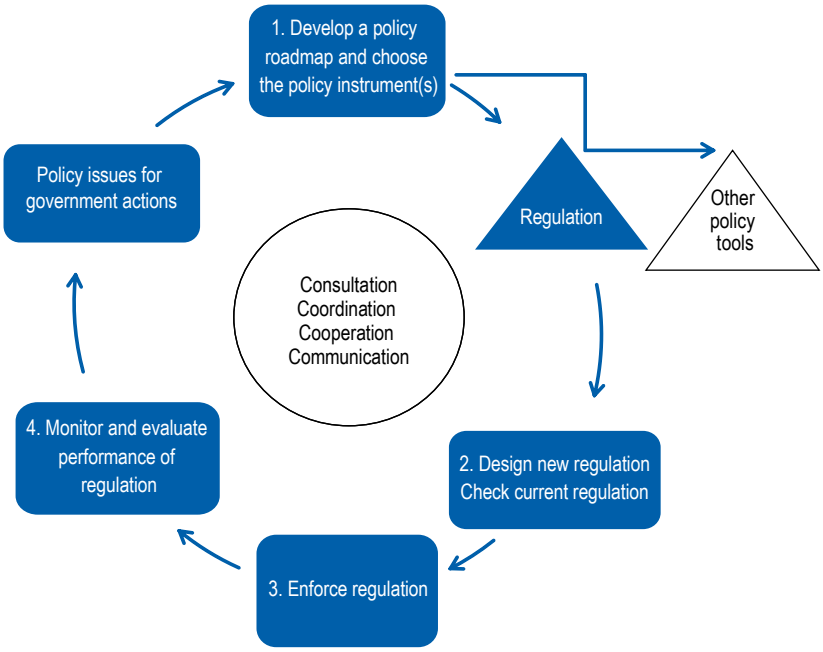
1.1. *Ex post* reviews and the regulatory cycle

The regulatory cycle "implies an integrated approach to the deployment of regulatory institutions, tools and processes (such as regulatory oversight bodies, administrative burden reduction programmes and Regulatory Impact Assessment)" (OECD, 2011[2]).

Evaluations of existing regulations can produce important learnings about ways of improving the design and administration of *new* regulations — for example, to reduce compliance costs or change behaviour more effectively. In this way, *ex post* reviews complete the 'regulatory cycle' that begins with *ex ante* assessment of proposals and proceeds to implementation and administration (OECD, 2015[1]).

Currently, e*x post* reviews of regulation are the weakest element of the regulatory cycle, as many jurisdictions do not have a legal obligation to carry them out. However, it is important to keep in mind that *ex post* reviews can provide the inputs for the creation, modification or elimination of current regulations on top of shedding light on the new policy issues that agencies must focus on. Figure 1.1 shows the regulatory governance cycle, where the use of regulatory policy is constant and each component provides valuable inputs for other stages of the cycle.

Figure 1.1. **Regulatory Cycle**



Source: OECD (2011), *Regulatory Policy and Governance: Supporting Economic Growth and Serving the Public Interest*, OECD Publishing, Paris, *http://dx.doi.org/10.1787/9789264116573-en*. (OECD, 2011[2])

Ex post reviews offer a broad perspective on the relationship that one or more regulations have with the existing legal framework. When elaborating an *ex ante* review, assumptions must be made in order to calculate the impact—in particular the cost and benefits—of the regulation. However, after the regulation has been enforced and an evaluation of the program has taken place is possible to estimate the impact of it with actual data.

Furthermore, *ex post* reviews allow policy makers to understand if the regulation has fulfilled its objectives and how efficient it has been in doing so. If the initial policy objectives are accomplished but the administrative burden on the regulated subjects or the cost of enforcing the regulation is too high, policy makers can redesign the regulation to make it more efficient. It is important to point out the role of the enforcement and inspections agencies, as they are in the frontline and interact directly with the regulated parties. In this sense, enforcement and inspection agencies have a crucial role, as they collect and manage data that are necessary for the evaluation of the regulation.

However, it could be the case that there is little data or information available to carry out a review. In these situations, is possible that reviewers need to rely on stakeholders to gather valuable information. Independent of the lack of data, stakeholder consultations provide benefits such as transparency, reduction of the public's resistance to the regulation and may offer a different perspective on the policy problem that the regulation is set to solve. Reviewers should keep in mind two important elements regarding public consultation of the stakeholders:

- All reviews should involve consultations with affected parties and, to the extent possible, be accessible to civil society.

- The nature and coverage of consultations should be proportionate to the significance of the regulations and the degree of public interest of sensitivity entailed.

Chapter 4 includes a more detailed description of the relevant aspects of stakeholder consultation in *ex post* reviews.

1.2. *Ex post* reviews in OECD countries

The importance of using *ex post* reviews to assess the ongoing worth of regulations is recognised in the 2012 *Recommendation on Regulatory Policy and Governance* of the OECD Council (OECD, 2012[3]). This states that member governments should:

> *Conduct systematic reviews of the stock of regulation … to ensure that regulations remain up to date,… cost effective and consistent, and deliver the intended policy objectives*

Based on the Regulatory Indicators Surveys, systems for the *ex post* review of regulation remain less developed than for other components of the regulatory cycle, particularly *ex ante* assessments, with fewer countries having formalised arrangements. For example, one third of OECD countries do not have a legal obligation to carry out *ex post* reviews, while all of them are obliged to evaluate regulations *ex ante*. Moreover, when *ex post* reviews are mandatory, they are not applied systematically to all major regulations (OECD, 2018[4]).

The reality is that *ex post* assessment of regulations are in some respects more demanding and less straightforward than assessments undertaken at the proposals stage. This reflects in part the challenges posed by the number of regulations potentially involved, and a need for different approaches and methods in different contexts.

There may also be more political or bureaucratic resistance to scrutiny of regulations in place than for those in prospect. This is perhaps understandable, in light of the possibility of a review finding that certain regulations have been unduly costly or failed to achieve their objectives.

Given the weaker record to date for *ex post* than for *ex ante* assessments, the following principles should assist in guiding improvements in the areas where this is needed.

1.2.1. Overarching Principles of ex post Reviews

Consistent with the Council Recommendation of 2012, there are three high level principles that should be widely applicable, regardless of the institutional settings of individual countries:

> *Regulatory policy frameworks should explicitly and permanently incorporate ex post reviews as an integral part of the regulatory cycle*

The broadly accepted notion of a 'regulatory cycle' recognises that regulations are akin potentially to wasting assets that require ongoing management and renewal. For reasons just noted, even if they start out well, many regulations may no longer be fit for purpose some years hence. The accumulated costs of this in economic or social terms can be high.

It is fundamental to achieving and sustaining good regulatory outcomes over time, therefore, that regulatory policy systems explicitly incorporate provision for *ex post* review along with *ex ante* assessment, and requirements for implementation and enforcement. Where such an integrated approach to *ex post* reviews is not in place, governments have the opportunity to pursue this as part of a longer term strategy to improve the overall quality of regulation and bring additional benefits to citizens.

Such requirements can in time also help foster a deeper 'culture of evaluation' within government, enhancing administrative capability and raising the standard of evaluations themselves. And it can help build (or restore) public trust in government's regulatory role.

> *A sound system for the ex post reviews of regulation would ensure comprehensive coverage of the regulatory stock over time, while 'quality controlling' key reviews and monitoring the operations of the system as a whole*

The stock of regulation is extensive in all countries, notwithstanding regulatory reforms and red tape reduction programs in many. It is important that opportunities for improving a country's overall regulatory performance are not missed through oversight or neglect (or resistance). How well reviews are conducted can vary, so a strong system would also have the capacity to guide and monitor review processes. And because such systems themselves normally involve a degree of 'learning by doing', provision for periodically evaluating their overall performance is also needed (See OECD, 2006[5]) Annex 2, which investigates the broad benefits from administrative burden reduction programmes and develops a possible methodological framework that could be used for evaluating existing and future programmes.

> *Reviews should include an assessment of the actual outcomes from regulations, against their rationales and objectives, and make recommendations to address any deficiencies*

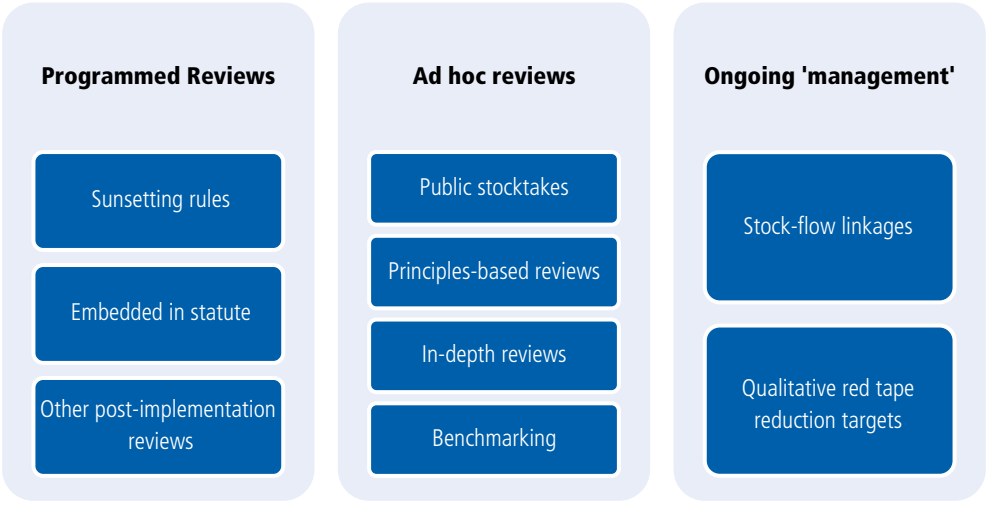
Just as *ex ante* regulatory assessment processes (RIA) seek to understand the likely net benefits of a new regulatory initiative, whether in social or economic terms (or both), *ex post* reviews ideally need to determine the extent to which these have been realised in practice. That would normally include an evaluation not only of compliance costs, but also other costs and benefits that relate to the primary objective of the regulation (e.g. financial stability, harm minimisation, competition, etc.).

To be useful to policy makers and the public, therefore, it is important that, where needed, *ex post* reviews contain recommendations for improvement. These could range from minor amendments to the regulations under review, to their removal or replacement.

1.2.2. Approaches to reviews

As mentioned above, *ex* post reviews are carried out systematically by a small group of OECD countries. In order to promote the elaboration of reviews, most countries have adopted one or more of the approaches included Figure 1.2. These methods force policy makers to analyse and evaluate their regulations in a more systematic manner, instead of leaving the decision to assess the regulation to them.

Figure 1.2. **Approaches to *ex post* reviews**



Source: Australia Productivity Commission (2011), *Identifying and Evaluating Regulation Reforms*, *https://www.pc.gov.au/inquiries/completed/regulation-reforms/pdf/regulation-reform-discussion-draft.pdf* (accessed on 20 October 2018). (Australia Productivity Commission, 2011[6])

The following paragraphs describe the approaches to *ex post* revisions and the most important considerations for each one of them.

Ex post reviews embedded in statute

For regulations or laws with potentially important impacts on society or the economy, particularly those containing innovative features or where their effectiveness is uncertain, it is desirable to embed review requirements in the legislative/regulatory framework itself. In such cases, a review can be crucial to necessary 'learning by doing', as well as for ensuring that there have been no unintended consequences. Embedding a review in the enabling legislation means that the review is more likely to take place when needed and address the key issues of concern. Importantly, it also provides a public signal of the government's desire to achieve good outcomes.

Sunset rules

'Sunsetting' refers to the automatic lapsing of regulations after a prescribed period unless they have been re-made. Depending on the details of their design and implementation, sunset clauses can be effective in removing regulations that have become redundant or are no longer cost effective, while providing an opportunity to make a case for renewal or modification.

This approach is normally reserved for secondary or subordinate regulations rather than primary legislation, for which the cost and disruption caused by any rules being inadvertently terminated could be high. A number of jurisdictions have separate provisions designed to ensure that other regulations are reviewed within prescribed periods.

As a failsafe mechanism, sunset clauses normally come into force only after an extended period from when a regulation was made, such as 5-10 years. The rules can be structured for extensive coverage of the regulatory stock, but may also be selective or involve specific carve-outs. Because of the potentially large number of regulations affected, processes need to be managed well to avoid review overload. Likewise, they need to be done with care to ensure regulatory certainly, especially if reviews are carried out at the last moment before the "expiration" date.

Post-implementation reviews

Such reviews constitute a further, more targeted 'failsafe' designed to detect any unintended adverse impacts in a timely way, before their costs become too great. Experience suggests that such impacts are more likely in circumstances where *ex ante* processes have been deficient or overridden.

A need to 'regulate first' will often arise in crisis situations, where action is called for, but there is little time to follow normal procedures. It may also reflect a political judgment that there is value in regulating notwithstanding a technical assessment to the contrary. While these can be legitimate reasons for proceeding to regulate, the reality that risks will generally be more elevated warrants a review taking place earlier than otherwise

Public 'stocktakes' of regulation

'Stocktake' reviews are useful for soliciting public views about current problems and priorities. They can also be an effective means of identifying cumulative regulatory burdens or detecting adverse interactions across different regulations.

Given their breadth of coverage and resourcing needs, they should normally only be undertaken at infrequent intervals, say 5 to 10 yearly. And, being complaint driven, they need to be accompanied by robust vetting processes before any recommendations are made.

Principles-based reviews

Stocktake-type reviews can also employ a uniform screening criteria or principle to focus on specific performance issues or impacts of concern. Such an approach, being more selective, tends to be more manageable than general stocktakes and can enable deeper analysis. The number of such reviews appears to have increased in recent years. The most common areas of focus have been anti-competitive effects or high compliance burdens (OECD, 2015[1]).

In-depth reviews

In-depth public reviews are characterised by a robust analytical and evidentiary approach. They also need to provide ample scope for stakeholders and the wider public to offer views and provide feedback along the way, especially on any preliminary findings and recommendations.

It follows that such reviews would normally be reserved for regulatory areas that are of major importance, where there may be a range of regulations and other policy instruments

at work, the combined effects of which would need to be understood and accounted for in proposing specific reforms.

Benchmarking

In many cases it can be difficult to determine the 'counterfactual' — how things would have turned out under a different regime — in assessing a regulation's performance, particularly where no major problems have arisen. Comparisons of regulatory performance across jurisdictions can be an effective means of gaining insights about the potential benefits to be had from adopting different design features, or alternative instruments. For example, one jurisdiction may choose to adopt performance based approaches to food regulation or workplace safety instead of a prescriptive approach; or impose regulatory barriers to entry to maintain transport quality standards versus a monitoring/complaints regime.

Such comparisons across jurisdictions can also serve as a form of competitive pressure for underperforming jurisdictions to adopt reforms.

Stock-flow linkages

Regulatory agencies with enforcement powers and inspection authorities are often best placed to ascertain how well a regulation is performing in such key respects as ease of administration and compliance, and achieving behavioural change. They can potentially play an important role in transmitting such information back to those responsible for regulatory design, whether within the regulatory body itself or in an overseeing department or ministry. However, such feedback loops are not well developed in most administrations (OECD/Korea Development Institute, 2017[7]).

It is important therefore to develop internal mechanisms to communicate information about the 'real time' performance of regulations in place, as this can avoid the need for larger reviews at a later stage when problems have become more manifest.

Regulatory offset rules

Formalised stock-flow rules that require the removal of existing regulations when introducing new ones, or that require agencies to reduce 'red tape burdens' by certain amount annually, employ what are effectively simple decision rules to contain aggregate costs of administration and compliance. Such approaches have been widely used across the OECD.

While not strictly forms of evaluation in themselves, they should provide a strong motivation to evaluate the worth of regulations in place. However, it is important that they not be administered bluntly, in a way that focuses more on costs than benefits of regulation. To avoid perverse effects, both sides need to be considered before changes are made.

2

Ex post assessment in Mexico and in OECD countries

The section explains the ex post evaluation practices in Mexico, Australia and Canada. For each country profile, it is included the motivations of their governments to undertake an ex post evaluation policy, a brief description of the policy, the common or frequent practices followed and the milestones, challenges as well as relevant key points. The purpose of the section is to provide an international comparison about the policies and practices that follow three of the most advanced OECD countries in ex post evaluation according to the composite indicators constructed by the OECD.

2.1. Mexico

2.1.1. Motivations of the Mexican government to undertake an ex post evaluation

The CONAMER (former COFEMER) is a recently created decentralized body of the Ministry of Economy with a dual competence: 1) to review new regulations and the regulatory stock and 2) to advocate the regulatory reform for the institutions within the Executive Federal (Congreso de la Unión, 2018[8]). However, even before the establishment of the CONAMER, COFEMER exercised quality controls of new and existing regulations by issuing opinions on the draft rules and related RIAs prepared by line ministries and regulators — exceptions include the Revenue Service, autonomous institutions and national security-related agencies (OECD, 2015[1]).

The former COFEMER recognized that evaluation projects were useful exercises which provide information to monitor the accomplishment of objectives and to avoid excessive and under-regulation. It had the duty to promote an *ex post* RIA so as to evaluate the implementation of regulation and to identify when objectives have been achieved. Thus, when a regulation has not reached the targets, it shall be redesigned.

COFEMER also recognized that once the regulation is implemented, it imposes new restrictions to any economic activity which brings down productivity and welfare. On the contrary, when the regulation achieves suboptimal levels it does not cover the risk it was designed for and ends with welfare loses. These reductions in welfare are an important element for making the case for an *ex post* RIA analysis.

COFEMER is also aware that the MIR ex-ante and *ex post* are relevant tools from the cycle of regulatory governance to ensure the quality of the regulatory framework. With these foundations, COFEMER undertook actions to evaluate selected regulation after some years of implementation, which now were taken up by CONAMER.

2.1.2. A policy on ex post evaluation

Current situation

In Mexico, an *ex post* RIA is the tool used by the government to determine if the regulation has achieved the planned objectives, and if it complies with efficiency and effectiveness criteria. An *ex post* RIA was set into practice as of 2013 (COFEMER, 2012[9]). Now, with the new General Law on Regulatory Improvement (*Ley General de Mejora Regulatoria* — LGMT), the responsibility of the *ex post* evaluation relies on the CONAMER at federal level and on subnational commissions for state level regulation.

The CONAMER and the subnational commissions, according to their influence area, may request from the regulated entities an *ex post* regulatory impact analysis to assess the

implementation and effects of current regulation—the assessment will be set for public consultation for 30 days. According to the new law, regulation includes any general norm as it is an agreement, notice, code, criteria, decree, directive, general order, technical order, statute, format, instructive, law, guideline, manual, methodology, national standard (NOM), rule, bylaw (*reglamento*) or any other issued by the regulated entity. (Congreso de la Unión, 2018[8])

On the other hand, Mexico adopted a *one-in, x-out* system to issue new regulations (the mechanism is further explained in the following sections). This type of conditional clauses pushes the government agencies to review potential regulation that can be dropped out, simplifying the regulatory framework. According to COFEMER, in 2017, 73 of 774 preliminary projects had a final resolution accounting for savings around MXN $29.5 thousands of millions (COFEMER, 2017[10]).

Evolution of the policy

In November 28th 2012, COFEMER published the *"Acuerdo por el que se implementa la Manifestación de Impacto Regulatorio ex post"*, which was active on March 30th of 2012 (COFEMER, 2012[9]). The agreement's objective was the promotion of mechanisms and procedures by which the evaluation of proposed regulation must follow a regulatory process.

The format of the MIR *ex post* was published within the agreement and it had 27 questions divided in 7 sections; the information contained in the format shall be sent through an electronic system. Since the release of the agreement, the MIR *ex post* was used to review NOMs and general administrative acts.

In the following years, the implementation of the MIR *ex post* in Mexico achieved relevant results. For instance, in the OECD composite indicators of *ex post* evaluation, Mexico performed in third place after Australia and the United Kingdom for primary laws and subordinate regulation. The OECD Regulatory Policy Outlook publishes the composite indicator of *ex post* evaluation and evaluates the implementation of member countries. According to this publication "…Australia, the United Kingdom and Mexico show a high level of practice and implementation of *ex post* evaluation in the composite indicators." (OECD, 2015[1]). Notwithstanding the performance of Mexico, the scope of the RIA *ex post* in Mexico is relatively low as it accounts for 9% of all primary laws issued—corresponding to the laws originated by the executive power. The composite indicator indexes four elements: the methodology proposed for the *ex post* analysis, the transparency of the analysis, the systematic adoption of the RIA and the oversight and quality control of the tool.

On March 2017, the Mexican government approved a new rule by which regulatory agencies must eliminate two regulations in order to promote a new one. The main objective of this policy is to reduce, renovate and continuously improve the regulatory stock. The *one-in, two-out* rule is also a mechanism to continuously identify and evaluate *ex post* useless regulation.

Finally, on May 18th of 2018, the General Law of Regulatory Improvement (LGMR) of Mexico was published in the Official Gazette. The LGMR indicates in the Article 70-II the obligation to conduct an *ex post* evaluation of current regulation, according to the best international practices. According to the new law, a National Council of Regulatory Improvement will approve the general guidelines to implement the *ex post* evaluation practice. These guidelines should be developed and implemented by each regulatory improvement authority at federal and subnational level. (Congreso de la Unión, 2018[8])

2.1.3. Ex post evaluation practices in Mexico

The new LGMR has put in place new considerations for the implementation of the RIA *ex post*. For instance, guidelines on *ex post* evaluation must be developed and implemented by each commission at federal and subnational level. The scope of the law on the norms subject to be scrutinized by the RIA *ex post* is broader, as it describes of the regulatory instruments under this tool. The new system of regulatory improvement is also an element to take into account in the regulatory process. However, a brief description of the practices of COFEMER until now, previous to the new law will be presented in this section (Congreso de la Unión, 2018[8]).

As mentioned above, COFEMER carries out mainly two different kinds of *ex post* evaluations: *ex post* regulatory impact assessments and a *one-in, x-out* rule for new regulatory proposals. The requirement for agencies to submit an *ex post* RIA was established in 2013, while the rule aimed at reducing the regulatory stock was introduced in 2017. Particularly, *ex post* RIA analysis is not mandatory for all regulations, as it applies on case-by-case basis.

Ex post regulatory impact analysis

CONAMER requires that public agencies from the public administration submit an *ex post* evaluation of the regulation they issue. Based on the nature and type of the regulation, the procedures that must be followed by the agencies may differ somewhat. The RIA questionnaire however includes the same sections in both cases. These sections are:

- Objectives of the regulation
- Initial problem and its status
- Updated statistics
- Feasible alternatives to the regulation
- Impact assessment of the regulation
- Cost-benefit analysis
- Public consultation
- Improvement opportunities

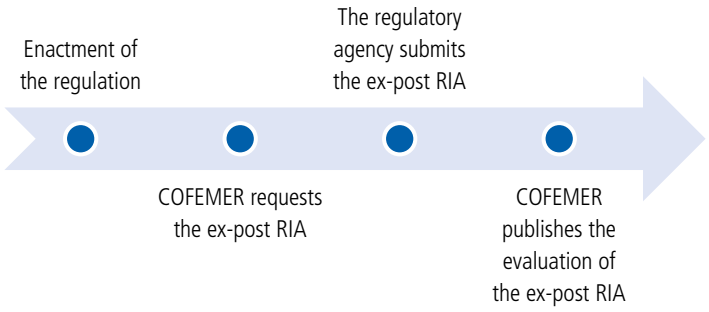
In the case of technical regulations, particularly Official Mexican Standards, the procedure is the following (COFEMER, 2012[9]):

- COFEMER must ask the regulatory agency to submit the *ex post* RIA at least 20 working days after the enactment of the norm.
- After the first year of validity of the norm, regulatory agencies have 30 working days to present the *ex post* RIA to COFEMER. Once COFEMER receives the document, it is available for public consultation online.
- If COFEMER deems that the information provided by the agency is insufficient, it has 10 working days to ask for more documentation. The regulatory agency must provide further details within 30 working days.
- Once the agency completes all the information requirements, COFEMER has 30 working days to present the *ex post* evaluation report.

The evaluation report must contain at least one of the following opinions:

- Promote actions aimed at improving the compliance of the norm and its objectives
- Suggest the derogation of the norm
- Suggest changes to the objectives of the norm
- Suggest complementary actions aimed at improving the application of the norm.

Figure 2.1. **Steps for the elaboration of an *ex post* RIA: NOMs**



Source: COFEMER (2012), "ACUERDO por el que se implementa la Manifestación de Impacto Regulatorio Ex post.", *http://dof.gob.mx/nota_detalle_popup.php?codigo=5279502*, p. 44. (COFEMER, 2012[9]).

Contrary to the case of the NOMs where COFEMER asks the regulatory agencies for the elaboration of an *ex post* RIA, for non-technical regulations the regulatory agency must request an evaluation project. If the regulatory agency requires the evaluation of a specific regulation, the responsible of the regulatory improvement department at the agency must notify COFEMER of the desire to carry on the *ex post* RIA. On the other hand, if the agency wants to evaluate its regulatory stock, a memorandum of understanding with COFEMER must be signed. It is important to notice that COFEMER's *ex post* RIA analysis of non-technical regulations apply only to regulations that ex-ante presented a high-impact RIA.

Two years after the implementation of the regulation, the regulator would start an evaluation exercise and send the *ex post* RIA report to COFEMER. From this point on, the procedure is identical to the one followed for the evaluation of NOMs. Moreover, it is possible for regulatory agencies to use another evaluator besides COFEMER. External evaluators however, must be approved by COFEMER and its cost must be covered by the regulator.

One-in, x-out regulatory policy

On May 2018, the Mexican government approved the General Law on Regulatory Improvement, by which regulatory agencies must eliminate the compliance costs of the new regulation in order to promote a new one. The main objective of this policy is to reduce, renovate and continuously improve the regulatory stock.

When promoting a regulation, public entities must submit a declaration proving that the proposal is either an exemption of the rule or it identifies two regulatory obligations

that equal the new compliance costs to eliminate —Table 1 shows which regulations are not required to comply with the one-in, x-out rule. For regulations subject to *one-in*, *x-out* rule, the administrative savings derived from the derogation, modification or repeal of other of other regulations must be greater than the costs of the new regulation. It is important to keep in mind that the regulations that will be eliminated must be from the same economic sector. If it is not possible to eliminate regulations from the specific economic sector, the agency must specify it in the RIA report (COFEMER, 2017[10]).

Table 2.1. **Exceptions to the one-in, x-out rule**

Emergency situations
The regulation complies with a decree, bylaw, regulation, etc. promoted by the Head of the National Government
The regulation complies with international commitments
The regulation must be updated periodically
The benefits of the regulation (in terms of market efficiency and competition) are greater that the compliance costs
The regulation derives from rules promoted by the Budget Office

Source: Congreso de la Unión (2018), "Ley General de Mejora Regulatoria", Diario Oficial de la Federación, *http://www.diputados.gob.mx/LeyesBiblio/ref/lgmr/LGMR_orig_18may18.pdf* (accessed on 22 May 2018) (Congreso de la Unión, 2018[8])

Regulatory agencies must submit a proposal containing the regulations that should be eliminated as well as the compliance costs generated by the new proposal and the savings derived from the reduction of the administrative burden. Regarding the quantification of aggregated costs and benefits at national level, it must be presented in annual terms. In the case of high-impact regulations, agencies must provide estimations considering a long enough time horizon to achieve the objectives defined. Agencies are expected to describe thoroughly the methodology used in the calculations and to specify all the assumptions that were used in the process.

Once CONAMER receives all the relevant information from the regulatory agencies, it has ten working days to issue a partial or total opinion over moderate impact regulatory projects. For projects with a high impact, CONAMER has 30 working days to release its report.

2.1.4. Milestones and challenges

Milestones

- The issue of the new General Law of Regulatory Improvement on May, 2018.
- The implementation of the RIA *ex post*, according to international standards.
- The experience gained on *ex post* evaluation since the implementation in 2013.

Challenges

- The implementation of a broader scope of the RIA *ex post* under the new law.

- The implementation of the RIA *ex post* at subnational levels.
- The quality control implementation process for a low set of regulation.

2.1.5. Key points

- The Mexican experience of the RIA *ex post* is relevant within Latin-American countries and OECD countries. This experience has achieved important positions in the composite indicators of *ex post* evaluation published by the OECD.
- The scope of the RIA *ex post* has become broader as it is indicated in the new LGMR.
- The CONAMER has to develop the guidelines to be used by the RIA *ex post*.

Box 2.1. **Update on the regulatory policy in Mexico**

The new LGMR promotes some modifications to existing elements of the ex post evaluation system in Mexico and adds a new ex post tool, sunsetting clauses. This new law considers the inclusion of sunsetting clauses into those regulations that will impose compliance costs. These regulations will be revised every five years and will be done before the corresponding better regulation authority (federal, state or municipal), using and ex post RIA. As for the modifications, the one in-x out was changed into a system that will eliminate the necessary number of regulations to reduce the existing compliance cost to, at least, the same amount that the new regulation will impose. These modifications and additions will strengthen the ex post evaluation system of Mexico even more.

2.2. Australia

2.2.1. Motivations of the Australian government to undertake an ex post evaluation

Australia has made considerable efforts to reform its regulation since the eighties. As the Australian regulatory policy was maturing, some questions about its effectiveness arose as well as concerns about how to measure the impact of implemented policies.

The main drivers to shaping those questions were the interest to improve the whole regulatory system and to orderly reduce the administrative burdens not only for business but for anyone whose interacts with the government—including citizens.

The most important Australian achievements on regulatory reform accounted three decades of challenges and efforts. Such experience leads to question about the impacts on society from a different approach of the already established Regulatory Impact Assessment (RIA) which analyses potential effects of regulation on ex-ante basis—when the regulation is emerging. The main goals of the regulatory reform focused on trade liberalization, capital markets, infrastructure, labour markets, human services and competition policy.

In addition to this approach, the Australian government was also interested on identifying new areas of regulatory reform. In order to undertake this objective, an analysis of existing regulation was needed so as to select the best alternatives and priorities.

Within this surge of ideas, the Australian government stated for the very first time in the *Industry Commission Act* of 1989 its intention to reduce the industry's regulation in order to pursue economic and social goals. As a consequence, the *Business Regulation Review Unit* was incorporated to the commission. The success was such that it worked on matters beyond the scope of its duties and it reported on planning, transport, housing, occupational health, competition, etc.

Afterwards, in 1998 the *Productivity Commission* was created with a broader scope and role in the type-of and range of government policies' it could intervene. Examples of the type of policies now reviewed by the *Productivity Commission* include gambling, great barrier reef, environmental, business, etc.

The *Productivity Commission* is now the agency in charge of the *ex post* evaluation of regulation and it has been a key stone moving the focus of evaluation. From just being a section of a broader study *ex post* evaluation became into a more systematic approach based on the cycle of regulation suggested by the OECD.

The commission was required then to focus on paths to achieve a more efficient and productive economy as a key to accomplish higher living standards through an effective regulatory framework. Regulations are the rules of the game, the requirements imposed by governments in order to influence decisions or behaviour of actors (business, citizens, consumers, organization, etc.). Such influence can boost, limit or inhibit economic or social activities from regulated entities or actors.

As the *Productivity Commission* has stated, regulation provides the foundations for the economy but generally it comes with costs and benefits. Some costs may be unnecessary as they arise from extensive reporting, unintended consequences, and ineffective, overlapping, unsuitable or disproportionate regulation. Thus, objectives of regulation can be achieved at a lower cost. Identification of needles costs and effects of regulation is not a simple task but efforts of regulators must be towards this approach.

Even if regulation was made on a cost-effective and a cost benefit basis, subsequent amendments will be needed as costs and benefits evolve over time due to technology issues, demographics, preferences, change in relative prices, rigidities, asymmetric information, etc. Which was fair and necessary regulation in the past may be a burden or a barrier in the future.

2.2.2. *A policy on ex post evaluation*

Current situation [1,2]

Australia has developed one of the most relevant *ex post* regulatory evaluation systems of both primary and subordinate legislations, according to the 2014 OECD composite indicators.

[1] (Productivity Commission, 2003[32])

[2] (Australia Productivity Commission, 2011[6])

The composite indicators for *ex post* evaluation measure four main areas: methodology, transparency, systematic adoption of the policy and, oversight and quality control.

The *ex post* evaluation tools that the Australian Government has implemented include:

- *Ad-hoc* and special purpose reviews
- Stock management approaches
- Programmed review mechanisms

The offices in charge of the enforcement of *ex post* evaluation in Australia are the Office of Best Practice Regulation (OBPR) and the Productivity Commission (PC). The OBPR has a dual role of assisting departments and agencies for meeting the requirements and delivering a quality Regulatory Impact Statement (RIS), and of monitoring and reporting compliance with the requirements for *ex post* evaluation (Office of Best Practice Regulation, 2017). The PC regularly publishes *ad-hoc* and special purpose reviews, as in-depth assessments to inform major regulatory and policy reforms, and benchmarking reviews of regulatory performance in different regions and countries (OECD, 2015).

In 2013, the Australian government put in place an evaluation stock-management approach to boost productivity, by reducing the costs of regulation to support innovation and investment, while maintaining the appropriate regulation to protect health, community safety and the environment. The plan focused on red tape reductions and in fostering a significant change in attitudes towards regulation across the public servants. The Australian Government made a commitment to reduce the regulatory burden by a net minimum of AUD 1 billion each year; from 2013 to 2016 however, from a whole-of-government perspective, the net savings accounted up to AUD 4.8 billion (Commonwealth of Australia, 2016[12]).

As all regulation has to be reviewed periodically so as to maintaining an appropriate regulatory framework and to keeping the regulatory burden low, the Australian government has implemented sunset clauses and Post Implementation Reviews (PIR). The sunset period for all subordinate legislations is of 10 years, while primary legislation depends on every individual case.

The PIR is a well-stablished tool in Australia that must be completed by agencies according to each of the regulations. For all major regulations—with substantial impact on the economy—a PIR must be completed within five years of its implementation. A PIR must be prepared within two years if:

1. The regulation has been introduced, removed, or significantly changed without a RIS;
2. The Prime Minister granted an exemption from the RIS requirements when the regulation was first introduced;
3. An agency sufficiently diverges from best practices in their preparation of a RIS.

If a PIR does not comply with the requirements or is not completed in time, the OBPR will report the agency as non-compliant on its annual reports. In the period 2015-16, 25 PIRs were completed and published and 28 PIRs were reported as non-complaint (Office of Best Practice Regulation, 2017[13]).

Evolution of the policy

During the 1970s, Australia experienced relevant changes in the economic environment due to trade liberalization. As it happened in many countries, the potential of international trade put pressure on business entrepreneurship and on the process to develop a firm; particularly on the administrative issues.

Within a context of stronger competition in the domestic market and the promotion of exportations, in 1974 the *Industries Assistance Commission (IAC)* initiated operations. Some of the IAC duties were to assist and evaluate the performance of the industry (with a strong focus on manufacture) and to measure the residual effects over the economy. Such assistance focused on the efficiency of productive resources, the promotion of economic activities to foster efficiency, the facilitation to change and the public scrutiny. It is relevant to notice that the focus of the IAC on a new wider economy encouraged it to develop tools to quantify effects of trade and policies over industries and the economy. Thus, IAC in collaboration with public agencies and academic institutions (as the Melbourne University) launched in 1975 the *IMPACT Project,* which was intended to provide information about the implications of structural changes for the industry, workforce and macroeconomic performance.

In 1977, although a government white paper recognized the benefits to reduce protection on the manufacturing industry in the long run, it showed concerns about the short term economic problems. Thus, a temporary special solution was proposed to assist certain industries and increase the reporting duties of the IAC. For instance, the employment effects of recommendations, capacity of the economy to absorb change and the reasons for changing. The debate about the levels of protection however, was about to start and some studies were launched on this matter. Some studies for instance appointed that protections only had to be reduced under certain conditions. The economic recessions however put pressure and slowed the reform process.

By the end of the 1970s, the level of manufacture assistance had declined on average within an environment of unfavourable economic conditions. Within an environment of political pressures and budget constraints, the IAC continued to report the government and the public, the cost of the industry protection.

At the beginning of 1980s, the expansion of mineral exports relieved the pressures over output, employment and inflation. Within this background, the government sent the IAC a reference with options to reduce protection over industries. The options to reduce such protection were analysed within the context of the objectives of the government—industry competitiveness or capacity building to absorb change for example. The economic conditions, however, worsen by 1982-83 and pressures to increase protection were back on the table, leaving the options analysed by IAC.

In 1983 the *Department of Industry and Commerce* (DIC) was designated as the responsible for the IAC. An institutional analysis however founded that some critical responsibilities of the IAC fell under the DIC, which would undermine the independence and effectiveness of the IAC. In practice, the risk of lack of independence was never an issue due to the institutional strength of the public entities in Australia.

A new government in 1983 brought a significant policy change over exchange controls (a first step on a series of financial deregulation). This change influenced the Australian markets

towards more openness and in 1988 a phased reduction over tariffs was implemented. The government ordered an independent review of the IAC concluding that the IAC *"…should be a more effective advisory body than it is at present. It should be more responsive to the information needs of Government in implementing its industry policy objectives. The Government too should play its part by specifying more clearly the information required".*

By 1987, the Australian trade balance was deteriorated showing increasing imports, a cumulative deficit on the current account and an important public debt. In this environment, the IAC gradually focused on other factors affecting the industry and competitiveness as the role of the regulation and administrative arrangements.

By 1990, the *Industry Commission* was created as the governments' review and inquiry body on industrial affairs. A potential detonator of this spin, originated in 1988, was the diminished terms of trade; it was the envisaged program to identify impediments over competitiveness as the non-tax charges of government on industries. The creation of the *Industry Commission* was founded from the merger of the IAC and the Inter-State Commission. Subsequently, the *Industry Commission* acquired the functions of the *Business Regulation Review Unit* afterwards the *Office of Regulation Review* (ORR). It is important to indicate that the budget of the new office increased, accordingly to the new tasks as the government performance monitoring.

By the middle of 1990s the program of the commission included:

1. The scope for productive work
2. Public and private participation and ownership on infrastructure
3. Efficient provision of community services
4. Intra-governmental cooperation
5. Efficient paths to reach environmental objectives
6. Regulatory impediments to improve industry efficiency

As the decade of the 1990s proceeded, regulation was in the focus of the microeconomic reform agenda. The debate over how regulation costs must be explicit and how unnecessary regulation inhibits the economic potential of Australia became a relevant driver of the policy.

Within this environment of economic challenges and changes in the perspective over industry assistance, the merger of the *Industry Commission* with the *Bureau of Industry Economics* and the *Economic Planning Advisory Council* formed the *Productivity Commission* took place in 1998.

2.2.3. *Ex post evaluation practices in Australia*

An *ex post* evaluation of the regulation refers to the impact assessment of a given policy; it can be made quantitatively, qualitatively or both, based on the characteristics of the project and the data or information available. Table 1 includes the main evaluation methods that are used by policy makers in the *Productivity Commission* of Australia.

Table 2.2. **Evaluation methods**

Quantitative methods
Performance measurement: Assess the results of a reform relative to a target.
Impact assessment: Identifies a full range of impacts in order to quantify the most relevant.
Cost-benefit analysis (CBA): Estimates the flow of costs and benefits in monetary terms and provides the net present value of the outcomes.
Cost-effectiveness analysis: Measures the relationship between inputs and intended outcomes.
Qualitative methods
Perception surveys: By consulting stakeholders it is possible to assess the views and opinions of relevant parties and to evaluate the effect of the regulation.
Case studies, roundtables, public hearings, and submissions: Can provide useful anecdotal evidence.

Source: Productivity Commission (2011), *Identifying and Evaluating Regulation Reforms*, *https://www.pc.gov.au/inquiries/completed/regulation-reforms/report/regulation-reforms.pdf* (accessed on 16 January 2018).

Based on international practices, the Australian government carries out several strategies to review regulations that have already been introduced (seeFigure 1). The depth, frequency and characteristics of each assessing method depend on the policy and the level of compliance of the policy makers. The three main categories for reviewing existing regulations are:

1. Management of the regulatory stock
2. Reviews that are established by law
3. Reviews that are performed ad hoc or in especial cases.

The management approach to reviewing regulations on *ex post* basis (after implementation) consists in administrating the regulatory stock. The three methodologies followed by the Australian government are:

1. **Regulator based strategy** which assumes that the authors of the regulation are in a position that allows them to administer and improve continuously the policies for which they are responsible.
3. **Stock-flow linkage rules** which limits the number of new regulations that can be emitted as the *one-in one-out* rule that some countries use.
4. **Red tape reduction targets** aim at reducing administrative burdens.

On the other hand, programmed reviews set mandatory requirements for an evaluation of a regulation to be carried out. Regulations may be reviewed at a certain period of time after their implementation or after a change or modification that triggers an assessment of its objectives and performance. As part of the programmed reviews approach, the Australian government uses three methodologies:

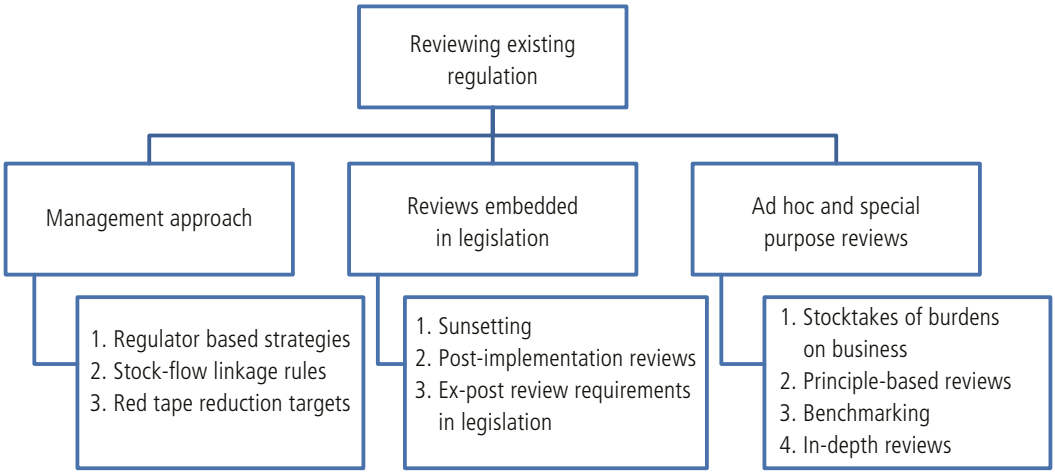
1. **Sunset clauses** establish the lifespan of a regulation, usually 10 years.
2. **Post-implementation reviews** assess the impacts of the regulation after its implementation.

3. ***Ex post* reviews requirements in new legislation** specify the time or circumstances under which a review will take place.

The last major approach to reviewing existing regulation is *ad hoc* and special reviews. These reviews take place as a need arises and can be classified in four categories:

1. **Stocktakes of burdens on business** are reviews that take into account the comments and information provided by businesses.
2. **Principle-based reviews** apply a principle as screening mechanism to determine if a regulation needs to be reviewed. The most common mechanism is restrictions on competition.
3. **Benchmarking** compares regulations across jurisdictions and identifies those that are lagging or are at the top in terms of regulatory quality.
4. **In-depth reviews** focus on the impact of a regulation, or of a small number of regulations in specific areas, activities of industries.

Figure 2.2. **Reviewing existing regulation in Australia**



Source: Productivity Commission (2011), *Identifying and Evaluating Regulation Reforms*, *https://www.pc.gov.au/inquiries/completed/regulation-reforms/report/regulation-reforms.pdf* (accessed on 16 January 2018).

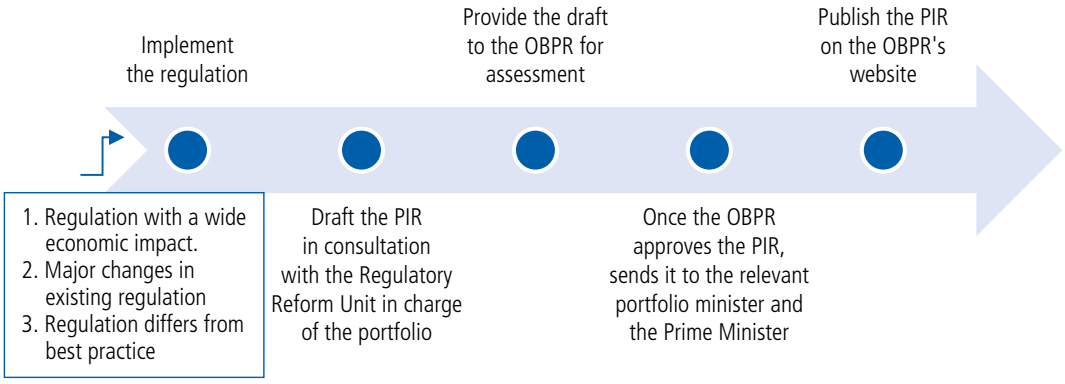
In the following subsections, post-implementation reviews (PIR) and sunset clauses will be described. These evaluation practices are the most common ones used in Australia.

Post-implementation reviews

Post-implementation reviews are meant to assess whether the regulation fulfils the objectives for which it was introduced and how efficient and effective on this matter performs. All agencies that create regulations that impact businesses, community organizations or individuals, are subject to the PIR requirements. The Figure 2 shows the process that policymakers must follow

to elaborate a PIR. PIRs mostly take place two years after the implementation of the regulation and the entire process can take up to several months.

Figure 2.3. **Steps for the elaboration of a Post-Implementation Review**



Source: Department of the Prime Minister and Cabinet, O. (2016), *Post-Implementation Reviews Guidance Note*: *https://www.pmc.gov.au/sites/default/files/publications/017_Post-implementation_reviews_2.pdf* (accessed on 20 February 2018).

As the Regulatory Impact Statement (RIS) applied to analyse regulation on ex-ante basis, a PIR is composed of a set of questions that aim at evaluating the results of the regulation. The questions that must be covered are:

1. What problem was the regulation meant to solve?
2. Why was government action needed?
3. What policy options were considered?
4. What were the impacts of the regulation?
5. Which stockholders have been consulted?
6. Has the regulation delivered a net benefit?
7. How was the regulation implemented and evaluated?

Policy makers can make use of the resources provided by the Office of Best Practice Regulation to make sure that the drafted PIR complies with the established requirements.

Sunset Clauses

Sunset clauses determine the lifespan of a regulation—particularly on subordinate regulations. According to the Legislative Instruments Act 2003, regulations should be annulled after ten years unless policymakers take action to keep them in place. In the case of a sun-setting instrument, remade legislation should be accompanied with a Regulatory Impact Statement (RIS) or an agency self-assessment and certification. (Office of Best Practice Regulation, 2016[14])

Due to the introduction of sunset clauses in 2003, a large number of legislations were to be annulled starting on 2015. It is possible however, in order to *alleviate* burdens over policy

makers to carry out an agency self-assessments instead of a RIS. Agencies self-assessments may be used in cases where the regulation must continue, the regulatory instruments are fit-for-purpose or the instrument will be remade without significant changes. If the regulation has been proven to be ineffective or will incorporate changes, a more thorough analysis (RIS) is required.

2.2.4. Milestones and challenges

Milestones

- A complete and dynamic regulatory framework on regulatory policy which provides institutional arrangements, powers and roles to officials and institutions.
- A traditional perspective of evaluation and scrutiny of public policies.
- Institutional strength of surrounding public agencies and/or ministries.
- Big reforms on financial, competition and business affairs.

Challenges

- A changing economic environment with pressures from external competition.
- Structural indicators with poor performance which limited the implementation of changes.
- Leaving aside a tradition of industry assistance policy.

2.2.5. Key points

- The Australian government has covered a long path to implement tools aimed to improve the regulatory quality in the country. This quality is further enhanced by extensive training and guidance provided by the OBPR to policy makers.
- Planning in advance has played a relevant role in the implementation of the regulatory quality tools and the regulatory policy cycle. For example, the Australian officials are trained to face the challenges from the large amount of legal instruments set to expire by the sun-setting clauses. Such training consists in developing a working program to manage individual regulatory projects.
- Moving to productivity prior to the industry assistance policy was one of the main drivers of the Australian goals of regulatory quality.
- From 2013 to 2015 the red tape reduction program reduced the administrative burden by $4.8— well above the $3.0 billion target.

2.3. Canada

2.3.1. Motivations of the Canadian government to undertake an ex post evaluation

In Canada there are two routes to create regulation, the primary law process made by the Parliament (originated by the Executive or Parliament Chambers) and the subordinate regulation originated by public entities. *Ex post* evaluation is present in both processes.

The OECD has documented the motivations of the Canadian Parliament to conduct *ex post* evaluations "…to make a judgment on the effectiveness of the RIA and seek improvement from the executive when this is shown to be required. A specific aspect of evaluation is whether the process used within the executive to compile and formulate RIAs is as technically sound as possible. The legislature should scrutinise and seek information from the executive about the process and methods used to produce RIAs". (OECD, 2012[15])

For the subordinate regulation, the Cabinet Directive on Regulatory Management (CDRM) states that the Government of Canada is committed to work "…with Canadians and other governments to ensure that its regulatory activities result in the greatest overall benefit to current and future generations of Canadians" (Treasury Board Secretariat, 2012[16]). Besides, the CDRM promotes the life-cycle approach to the regulation making process in which the focus is given not only in the regulatory development but also in the implementation, evaluation and review of regulations. This review of regulations stresses implicitly that the norm creation process is a dynamic and evolutionary game.

The CDRM presents seven criteria that government officials must take into account when regulating. These principles together with the life-cycle approach provide foundations to promote *ex post* analysis of regulation. The principles are the following:

1. Protect and advance in the public interest
2. Advance the efficiency and effectiveness
3. Make decisions based on evidence
4. Promote a fair and competitive market
5. Monitor and control the administrative burdens
6. Create accessible, understandable and responsible regulation
7. Require timeliness, policy coherence and minimal duplication

2.3.2. A policy on ex post evaluation

Current situation

Canada carries out an *ex post* evaluation for both primary and subordinate legislation. Primary laws can be initiated either by the executive or the parliament but an ex-ante RIA is only mandatory for drafts initiated by the executive branch which accounts for 77% of this set of laws. All primary laws however, can be subject of *ex post* evaluation. On the other hand, RIA and *ex post* evaluation are carried out in all subordinate regulations (OECD, 2015[1]).

The Regulatory Affairs and Orders in Council Secretariat (RAOICS) of the Privy Council Office (PCO), supports the Canadian Cabinet in regulatory matters. The RAOICS is the body at the federal government responsible to control for regulatory quality and to provide oversight in consultation and *ex post* analysis for primary laws.

On the other hand, the Treasury Board of Canada Secretariat (TBS) is responsible for providing oversight for subordinate regulations, playing a key role in helping to assure regulatory quality (OECD, 2015[1]). The Cabinet Directive on Regulatory Management indicates the duties of public entities regarding the quality control of regulation, including the *ex post* analysis and tools on this matter, for instance, the regulatory framework review and the assessment of the effectiveness of regulation.

The TBS is responsible for overseeing the implementation of the *one-for-one* rule. The purpose of this rule is to control administrative burdens on business arising from new regulations (Treasury Board of Canada Secretariat, 2013[17]). The rule requires regulators to *"consult affected stakeholders prior to seeking approval to pre-publish a regulatory proposal, or prior to final approval of the regulation"* (OECD, 2015[1]).

Some categories of regulatory reforms may be exempt from the application of the *one-for-one* rule (Treasury Board of Canada Secretariat, 2014[18]):

- Regulation that implement non-discretionary obligations.
- Regulations related to tax or tax administration.
- Regulations that address emergencies or crisis situations or are deemed by the Treasury Board to address other, unique exceptional circumstances.

In Canada, sunset clauses are used in the law making, however, the Cabinet recommends that caution should be taken when considering including them, for, it demands resources from the executive and the legislature (OECD, 2012[15]). Moreover, all federal departments are required to implement a five-year departmental evaluation plan which has to be aligned with the evaluation program approach to minimize burden in departments.

Evolution of the policy

In 2007, the Cabinet Directive on Streamlining Regulation was issued by the government of Canada. Such document indicated that departments and agencies are responsible for ensuring that regulation continually meets its initial policy objectives. Such departments must assess on regularly basis, the performance of regulation so as to identify opportunities to improve the regulatory framework (Treasury Board of Canada Secretariat, 2007[19]). Once identified, regulation was to be examined with a focus on:

- its effectiveness in meeting policy objectives
- the level of government intervention,
- its clarity and accessibility for users
- its overall impact on competitiveness, including trade, investment and innovation

According to (Sharma et al., 2013[20]), in April 2009, the New *Policy on Evaluation* (POE), the *Directive on the Evaluation Function* (DEF) and the *Standard on Evaluation for the Government*

of Canada (SGC) were issued according to the guidelines of the *Financial Administration Act*. The DEF was planned to support the objectives defined on the POE and the SGC described the quality requirements of evaluations.

In 2010 however, the Prime Minister Stephen Harper created the Red Tape Reduction Commission formed by twelve members, including 5 parliament participants, 6 from the industry or business representatives and one state minister (as a chair). The objective of the commission was to identify irritant burdens from the federal regulatory framework and to recommend alternatives to reduce such burdens. (Government of Canada,(n.d.)[21])

The commission launched 15 roundtable sessions to identify the point of view in face of the regulation from industry representatives. One of the main findings was the frustration over duplication of regulations, high administrative costs, lack of customer-service orientation in public officials and poor understanding of industry realities. These findings were documented on the report "What was heard" (Government of Canada, 2011[22]). The report included comments over the feedback received on irritants related to:

- Policy issues underlying regulations
- Non-mandatory programs and policies
- Regulations and programs examined under federal initiatives
- Federal-provincial-territorial coordination

The government followed-up the report with independent experts to evaluate the identified reforms. Thus, in 2012 the Commissions' Recommendation Report was released with 15 systemic changes and 90 department solutions as the summary of such monitoring. The strategy of the government to attend the main suggestions of the report was the Red Tape Reduction Action Plan (Government of Canada. Treasury Board, 2013[23]). The action lines under such plan were:

- Reducing the burdens on business
- Make easier the business with regulators
- Improve services and predictability

Burdens on business: within this action line, the government addressed business opportunity areas implementing initiatives that went beyond specific department or sector solutions to reduce red tape. This is the case of the *one-for-one Rule* which had the objective modify the way entities regulate.

Another solution was the *small business lens* to avoid unintended on small business. In practice, this was an amendment to the RIA analysis about impacts over small businesses.

Business with regulators: following-on the consultation forums, 41 complex processes were subject to be simplified. Additionally, the regulators were required to publish interpretation guidelines over policies.

Improving service and predictability: The government committed to make public a 24-months agenda with the following work on regulatory modifications. Besides, it also committed to establish a Regulatory Advisory Committee that will review the *one-for-one* rule, the Small Business Lens, etc.

In 2012, the Cabinet Directive on Regulatory Management suppressed the Cabinet Directive on Streamlining Evaluation of 2007 with new functions on policy and regulatory evaluations that will be described in the next section.

2.3.3. *Ex post evaluation practices in Canada*

Canada's approach to red tape reduction is determined by the Cabinet Directive on Regulatory Management (Treasury Board of Canada Secretariat, 2013[17]). This document establishes three mechanisms to review existing regulations.

One-for-one rule

This approach has two main objectives: to limit the growth of the administrative burden that businesses face and to reduce the regulatory inventory. The former is achieved through the requirement to offset the same amount of administrative burden that is created every time a regulatory change increases red tape. In the case of new regulations, the regulatory agency must offset the regulatory burden and repeal at least one regulation. The rule applies for all Federal departments, agencies and entities of the over which the Cabinet has authority and for all Statutory Orders and Regulations.

Ministers can draw from their portfolios or departments the administrative burden or regulation that must be offset. Furthermore, agencies have up to two years — starting on the day that the change in the rule or the new legislation is approved — to submit the required reduction in administrative burden and/or the elimination of a regulation.

When introducing a regulatory change, the departments must comply with the following procedure (Treasury Board of Canada Secretariat, 2013[17]):

1. Triage process: The triage is an early assessment of the regulatory proposal. It is based on a principle of proportionality and classifies regulations according to their impact on safety, costs on the economy and on other agencies of the government (Treasury Board of Canada Secretariat, 2014[18]).
2. Regulatory cost calculator: This tool monetizes the costs related to the regulatory change, both in terms of the regulation that is being introduced and the administrative burden. It is based on the Standard Cost Model Methodology (SCM Network,(n.d.)[24]), which considers the administrative burden that the business and citizens face, as well as the number of business or people that must comply with the regulation.
3. Consultation: The views of relevant stakeholders must be considered, both for the regulatory change or introduction that is intended, as well as for the regulation that will be offset.
4. Regulatory impact analysis statement: Based on the results from the Triage, the departments must complete a Regulatory Impact Analysis (RIAS) statement. This document evaluates the regulation that is being proposed as it provides evidence supporting the regulatory instrument selected by the authorities (Treasury Board Canada,(n.d.)[25])

One-for-one template: This document includes the value of the administrative burden that is created, its reduction, the legislation that will be eliminated and the agency that is in

charge of the regulation. The former applies in cases where two or more ministries propose a new rule, in which case the agency responsible for complying with the one-for-one rule is the one with the lead role in the designing and managing of the legislation (Treasury Board of Canada Secretariat, 2013[17]).

Reviewing regulatory frameworks

Regulatory agencies must evaluate their regulations and assess whether they are meeting their objectives or not. Departments and ministries must analyse if the instrument is the right one, review if the regulation is easily understandable and should examine the impact of the legislation on competitiveness (Treasury Board Secretariat, 2012[16]).

Measuring performance

The Canadian government requires its agencies to define indicators and performance measurement strategies to assess the effectiveness and compliance with the regulation. Results from these measurements can be used to redesign the policy instrument or the compliance plans (Treasury Board Secretariat, 2012[16]).

Other instruments

When enacting a new regulation, agencies are allowed to include a sunset clause establishing an expiration date for the new rule. However, this option in not used systematically and should only be consider as a last resort option (Government of Canada,(n.d.)[26]).

2.3.4. Milestones and challenges

Milestones

- A long experience in the implementation of *ex post* assessment of subordinate regulation and the evaluation of primary laws.
- A dynamic regulatory framework on regulatory policy which includes evaluation *ex post*.

Challenges

- Better information regarding the evaluation policy of regulations on primary laws.
- Update information about the work achieved on regulatory evaluation.

2.3.5. Key points

- *Ex post* evaluation is one of the pillars of regulatory quality control in Canada. Main focus of this task is on subordinate regulation but primary laws are also subject to evaluation.
- Experience of Canada is relevant between OECD countries. In 2015, Canada performed seventh in the OECD composite indicator on *ex post* evaluation for primary laws and fourth for subordinate regulation.

3

Towards a typology of *ex post* assessment

The OECD Regulatory Policy Outlook 2015 recognizes that policy evaluation was moving to an institutionalized practice but efforts were still, unevenly spread across sectors and policy fields. (OECD, 2015[1]) Besides, the majority of the *ex post* exercises have been conducted on a principle-based approach—as burden reductions or promoting competition.

While the report stressed that the *ex post* evaluation was one of the least developed regulatory tools; a generalized government concern about the resources involved in *ex post* exercises drives a more methodical use of stakeholder engagement to prioritize areas.

The Productivity Commission of Australia went through a report with approaches on regulatory reviews during 2011. Here are briefly listed such approaches, which may focus on *ex ante* or *ex post* evaluation. Notwithstanding some methodologies, overtly focus on *ex post* evaluations others require an evaluation to accomplish the policy objective. For instance, the *one-in*, *one-out* rule demands an *ex post* assessment to identify a set of useless regulations to discard. Alternatively, the red tape targets require an assessment to identify the opportunity areas and *sunsetting* clauses formally call for an assessment. (OECD, 2015[1]).

1. Stock management approaches

a. Regulator-based strategy: includes monitoring of performance indicators.

b. Stock flow linkage: is the connection between *ex ante* and *ex post* evaluation as *one-in*, *one-out* rule.

c. Red tape reduction targets: settled to reduce administrative burdens.

2. Programed review mechanisms

a. *Sunsetting* clauses: a rule, which automatically nullify a statutory act after a defined period unless some conditions prevail.

b. *Process failure* post-implementation reviews: an assessment to identify potential harm effects of a regulation in which the ex ante evaluation was inadequate or it was introduced despite potential deficiencies or downside risks.

c. *Ex post* review requirements in new regulation: normally to assess the effects and potential impacts due to uncertainty.

3. *Ad hoc* reviews

a. Stocktakes of burdens: exercises to reduce compliance costs.

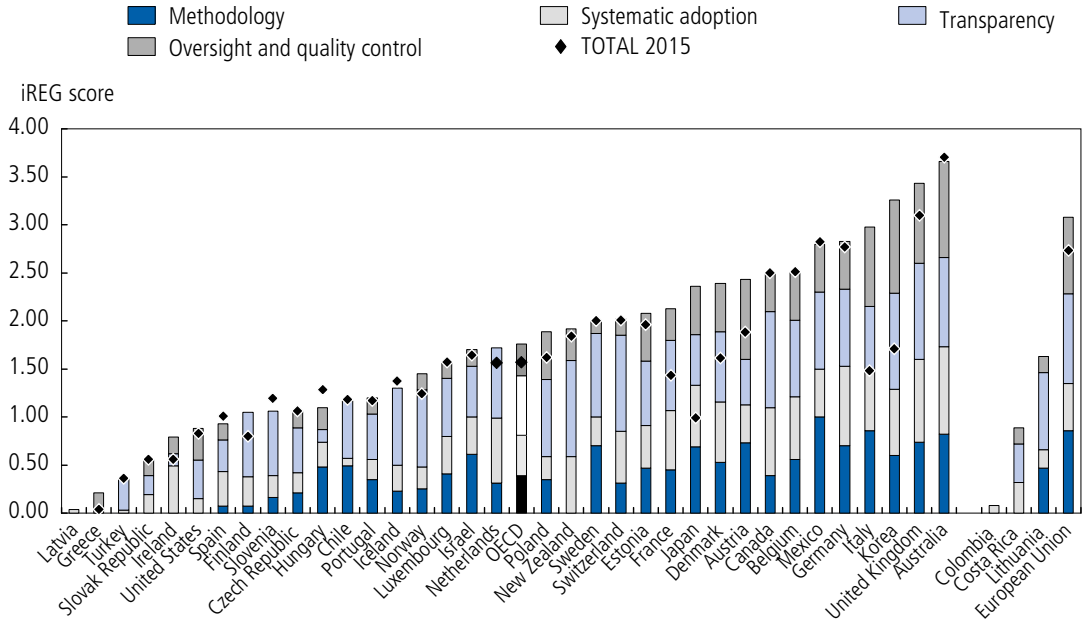
b. Principles-based: with focus on a specific objective, as eliminating the regulation that limits competition.

c. In-depth reviews: to evaluate major areas of regulation with wide ranging effects.

The Regulatory Policy Outlook 2018 accounted that Austria, Denmark, France, Italy, Japan, Korea and the United States have undertook substantial reforms in their *ex post* evaluation systems (OECD, 2018[4]). As it can be observed, the Figure 2.1 and Figure 2.2 show the composite indicator of *ex post* evaluation for primary and secondary laws between member countries.

As it can be seen, there is still a dissimilar adoption of a policy on *ex post* evaluation across OECD member countries. Australia, the United Kingdom and Korea are still the most outstanding countries in both primary and secondary regulation.

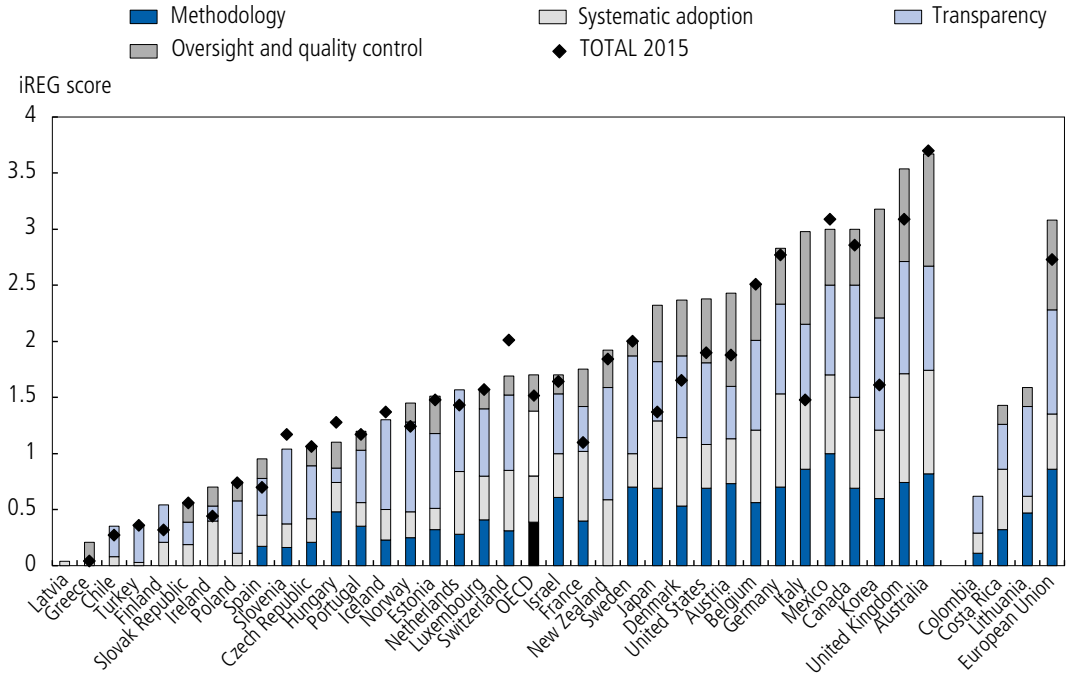
Figure 3.1. **Composite indicators: *Ex post* evaluation for primary laws, 2018**



Note: Data for OECD countries is based on the 34 countries that were OECD members in 2014 and the European Union. Data on new OECD member and accession countries in 2017 includes Colombia, Costa Rica, Latvia and Lithuania. The more regulatory practices as advocated in the 2012 Recommendation a country has implemented, the higher its iREG score.

Source: Indicators of Regulatory Policy and Governance Surveys 2014 and 2017, *http://oe.cd/ireg*.

Figure 3.2. **Composite indicators: *Ex post* evaluation for subordinate regulations, 2018**

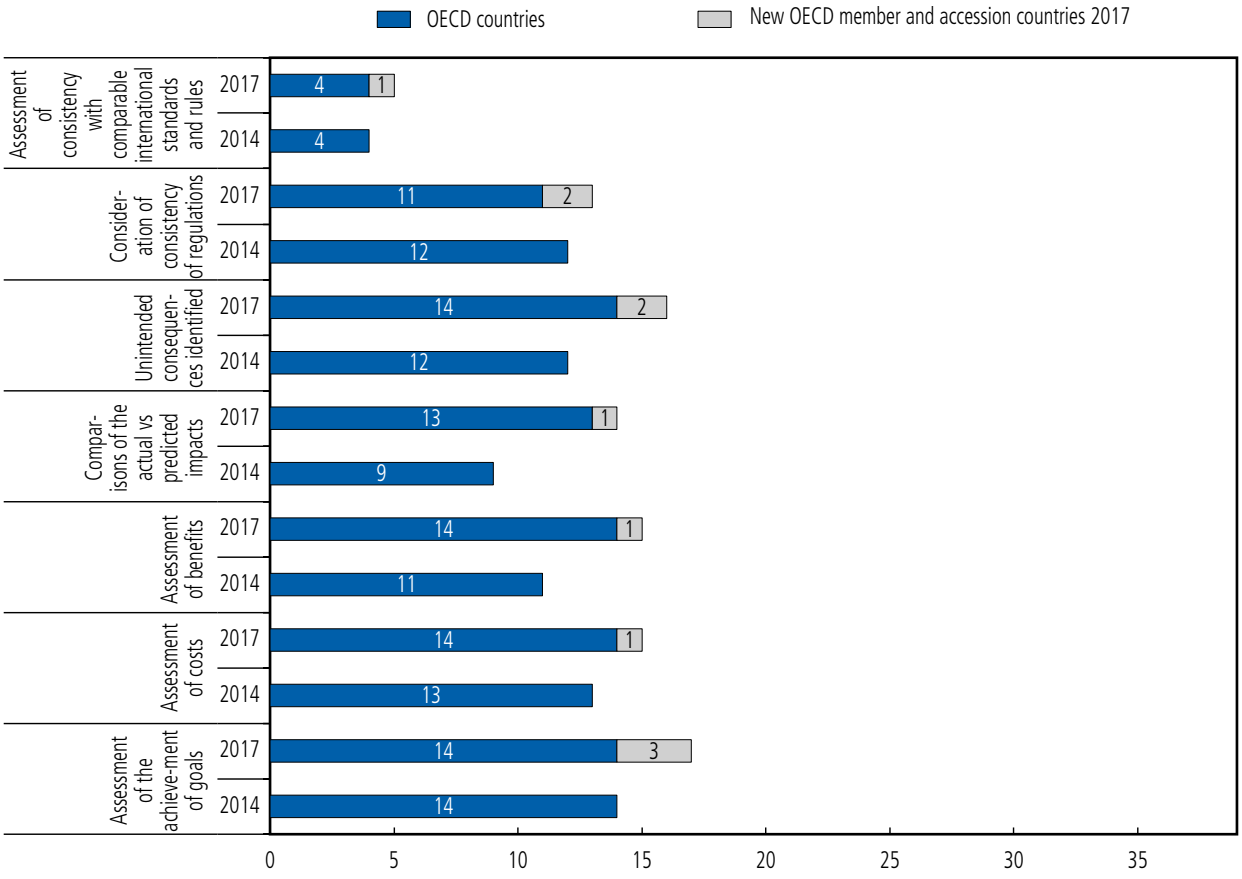


Note: Data for OECD countries is based on the 34 countries that were OECD members in 2014 and the European Union. Data on new OECD member and accession countries in 2017 includes Colombia, Costa Rica, Latvia and Lithuania. The more regulatory practices as advocated in the 2012 Recommendation a country has implemented, the higher its iREG score.

Source: Indicators of Regulatory Policy and Governance Surveys 2014 and 2017, *http://oe.cd/ireg*.

The composite indicators above include a variety of evaluation exercises. The majority of the OECE countries however, are still yet to establish a comprehensive methodology for *ex post* evaluation Figure 2.3. For instance, only nine member countries have a *threshold* for deciding whether an *ex post* evaluation is required and 22 countries have established an automatic evaluation requirements. Most remarkable, just 14 countries have assessment on costs, benefits and goals and four have an evaluation based on international standards.

Figure 3.3. **Systematic adoption of a methodology for *ex post* evaluations**



Note: Data for OECD countries is based on the 34 countries that were OECD members in 2014 and the European Union. Data on new OECD member and accession countries in 2017 includes Colombia, Costa Rica, Latvia and Lithuania.

Source: Indicators of Regulatory Policy and Governance Surveys 2014 and 2017, *http://oe.cd/ireg*.

3.1. Key questions for reviews

Reviews concerned with the performance of regulation, rather than merely assessing procedural or compliance matters, will generally need to address four key questions:

3.1.1. Appropriateness: reviews should address as a threshold question whether a valid rationale for regulating still exists

In assessing the performance of a regulation or regulatory regime, it is important firstly to determine whether the original policy logic justifying it still stands, given changes that may have subsequently occurred in policy frameworks, the economy or society. In cases where the rationale was not made clear at the outset — a not infrequent occurrence — this may require the reviewer to determine what it *should* have been or at least what it should be going forward.

A commonly cited rationale for regulating comes under the rubric of 'market failure', where features inherent to some markets, such as asymmetric information or externalities, can lead

to inefficient economic outcomes that may be ameliorated through government intervention. Other legitimate policy rationales include achieving more equitable outcomes (for citizens or regions) than markets would produce, or enhancing opportunities for citizens through better access to basic services such as education and health.

3.1.2. Effectiveness: reviews should determine whether the regulation (or set of regulations) actually achieves the objectives for which it was introduced

Regulation is not of value for its own sake. It is (or needs to be) predicated on the expectation of it addressing a policy issue or problem such as to improve things. It is therefore fundamental in reviewing the performance of regulations in place that outcomes in the policy area of concern are assessed relative to what otherwise would have occurred. That is not to suggest that this is easy to achieve, given that there will often be multiple influences on observed outcomes over time, but without this as the objective, it will be harder to make enhancements and build public confidence in regulation itself.

3.1.3. Efficiency: reviews need to determine whether regulations give rise to unnecessary costs (beyond those needed to achieve the policy goal) or other unintended impacts

The overall benefits to society of regulation need to account not only for its effectiveness in addressing a public policy issue, but also the costs and other impacts incurred in doing so. Improved outcomes in a particular domain, for example reduced city congestion, may not be worth having if the cost of achieving these leads to worse outcomes elsewhere. A good regulation would achieve its goal at minimum cost and without leading to unintended adverse outcomes as a side effect of addressing a policy problem.

3.1.4. Alternatives: reviews should consider whether modifications to regulations, or their replacement by alternative policy instruments, are called for

An *ex post* review is of little value if it does not either affirm that a regulation is performing well and needs no change, or identify changes that would improve its performance. It is thus important that reviews be required to make recommendations about any changes considered beneficial. Consideration also needs to be given to how recommendations can be most effectively put into effect.

3.2. Methodologies

In seeking to answer these basic questions, a review would need to shine light on a variety of further issues. For example: How well were the regulations administered? To what extent did they bring about changes in behaviour? How were impacts distributed across the community?

Unlike *ex ante* assessments, the ability clearly exists to consider information relating to *actual* impacts of the regulations under review.

Nevertheless, answering such questions is rarely straightforward. It can be assisted by adopting a systematic approach that includes the following features.

3.2.1. Evaluations of regulations should be conducted within a cost-benefit framework that firstly identifies and documents impacts of relevance, and then assesses their relative magnitude.

Most regulations will have a variety of impacts of varying significance. These can be economic, social or environmental. Impacts can also vary within the community and across regions within a country. Such impacts need to be identified in a systematic way as a precursor to the more difficult task of assessing the net effects. The enumeration of different impacts can in itself often provide some useful insights.

Indirect as well as direct effects need to be accounted for, where feasible. Impacts on parties not targeted by the regulation, or 'downstream' from those who are, can sometimes outweigh the direct impacts. For example, a regulation that imposes requirements on producers to meet certain desirable environmental objectives, may involve significant costs being passed on to other producers, which can work against a government's economic development objectives. And, rules that impact on prices or market competition can have impacts on innovation and productivity.

3.2.2. Quantification should be attempted where feasible, as it can bring additional rigour to assessments of impacts and potential outcomes.

Evaluations typically need to draw on both qualitative and quantitative methods of analysis. In many cases, the qualitative considerations will be among the more important (e.g. environmental amenity, perceptions of safety, etc.). However, the greater the quantification of impacts, the easier it will generally be to make an overall assessment where subjective elements are present. An estimate of costs expressed in money terms will often help in making judgments as to whether benefits that cannot be so expressed are 'worth it'. For example, would the amenity value of retaining heritage features of the built environment in a potential industry development area outweigh the estimated income gains from change of use? Would preservation of native fauna be worth the estimated costs of restricting agricultural development? An ability to pose such questions can help inform necessary value judgments at the political level.

More refined quantitative methods such as multivariate or regression analysis can also provide a rigorous means of determining *causality*; that is, for distinguishing impacts due to a regulatory intervention from those potentially attributable to other changes or influences (see Malyshev 2006, OECD 2011).

3.2.3. Data requirements are best considered at the time a regulation is being made, as part of wider consideration of the type of ex post review that would be most appropriate.

Reviews can fail to produce credible findings and recommendations for lack of adequate 'evidence'. Standard data collections within government may not have the granularity or specificity needed to evaluate all relevant impacts of a regulation. In such circumstances it may be that the data needed to assess performance has to be collected as part of the regulatory regime itself. This can be done under compliance reporting obligations and/or through survey instruments. If the latter, the usual precautions against response bias apply.

Regulated entities will generally be a useful source of qualitative information, but should be encouraged to provide quantitative evidence as well.

The increasing availability of open data, 'big data' and new statistical techniques have considerable potential both to enhance evaluations and enable innovations in how these are conducted. Patterns and responses may be discernible that would not have been possible using traditional statistical methods. This is a relatively new area holding out considerable scope for learning across jurisdictions.

3.2.4. The observed impacts of a regulation should be compared with 'counterfactuals' — how things would have turned out otherwise.

At issue in a regulatory review is not just whether a given regulatory regime has on balance achieved its goal or yielded certain benefits, but whether better results may be achievable in future by adopting modifications or using alternative policy instruments, or indeed without further government intervention at all. In this sense an *ex post* review must also involve some *ex ante* analysis. The difference in this case is that actual data on impacts to date should be available. This can provide a more tractable foundation for analysing how variations could have made a difference in the past.

As noted previously, one useful technique for understanding 'counterfactuals' is to benchmark domestic regulations against those found in other jurisdictions that address the same policy issue using alternative approaches. The most useful jurisdictions for benchmarking purposes will be those where the policy objectives and broad institutional structures are similar to those domestically. It is a technique well-suited to federal systems of government, therefore, as well as at the local government level.

3.2.5. Tools for ex post assessment

The exercises of *ex post* evaluations expressed above are in fact instruments or mechanisms to induce an assessment. For example, *sunsetting* clauses and *one-in*, *x-out* rules are legal devices, which call for an assessment in order to comply optimally and effectively with the request. The implementation on the other hand of a specific methodology to evaluate the impact of a regulation may depend on several factors. For instance:

1. The width of the regulation; a law amendment, a new law, a set of laws and subordinate regulation, etc.
2. The age of the regulation
3. The capacity to observe a control situation or a base line scenario
4. Data availability
5. The characteristics and access to the beneficiaries and affected parties.
6. The capacity to isolate effects of potential regulations that may converge in sectors as telecommunications and competition.
7. Resources to conduct methodologies

8. The balance between the cost of the evaluation vs the potential impacts, the population target, the empirical evidence of causality, etc.

As mentioned previously, *ex post* assessment of regulations begins with the identification of impacts in terms of direction and ideally accounting for magnitude, followed by a cost benefit analysis. Thus, the first step in the assessment of the regulation is collecting evidence of such impacts. These impacts may be recognised in academic or empirical studies, but it is important to collect own measurements, unless there is no data budget or even time to produce them.

Academic literature may account for a range of methodologies both qualitative and quantitative to assess potential impacts of a policy, a programme or potentially a regulation. Qualitative and quantitative analysis both have advantages and weaknesses. Quantitative approaches are data-intensive and normally require more resources, but they may be precise in statistical terms for a defined variable—they may be limited however in the application, as they require several conditions and technicalities to produce real or factual evidence.

Alternatively, qualitative evaluation has gained relevance in the lasts years, and supporters argue that such methodologies are good for impact analysis. These methods are more flexible and deeper in the scope of the examination, as information inputs include no numeric data and it is possible to conclude on causality without control groups. They lack however statistical power or magnitude identification. Some experts on the other hand, claim that qualitative designs or approaches are advocated when they are used in conjunction with other evaluative functions as implementation analysis, process analysis, etc. (Lawrence B. Mohr, 1999[27]). For the evaluation of regulations, the implementation analysis would be a relevant asset.

Guidelines explaining what sort and number of regulations should be under scrutiny of an *ex post* evaluation, support public officials to develop a complete regulatory policy. Afterwards, governments should produce specific guiding materials to select methodologies to assess impacts according to defined criteria. The selection of a specific methodology without instructions may be challenging, as criteria should take into account available resources but also, proportionality principles, temporary nature, exemptions and expected outcomes, data available, etc. Thus, these guidelines should support the evaluation officer in deciding if the potential regulation would be assessed following a qualitative, quantitative model or both. Besides, the depth of the study and the particular technique will be selected according to established guiding principles.

Notwithstanding the relevance of the regulation, the evaluation may start with a public consultation and a qualitative assessment to identify potential impacts and if needed, a quantitative analysis can be launched.

The range of qualitative techniques is well documented in the academic literature and summarized in practitioner guidelines to identify potential effects of government interventions. Some of these techniques comprise depth interviews, focus groups, implementation analysis of the regulation, process mapping, *problem trees*, data analysis, etc. Qualitative research methods do not use variables defined *ex ante,* instead observe interactions between participants, describe initial conditions and thus identify a set of events over time, which finish in the results and impacts. The key questions of the qualitative assessments incorporate: which are the impacts of the regulation? What are the significance of the impacts on stakeholders? Which are the mechanisms that produced such results? What is the context in which the impacts were developed?

The quantitative methods in contrast can incorporate a numerous of methodologies, statistical or deterministic. The most appropriate method can be selected according to:

1. The availability and quality of data and the capacity to collect;
2. The number of recipients or individuals affected by the regulation which define between a sample or the whole set of observation units;
3. The cost-benefit in the application of the methodology;
4. The adequateness to provide robust results;
5. The capacity to isolate effects when several regulations may converge.

Both methods may be very useful when regulation may have a potential counterfactual. Such situation or control group can co-exist with the treatment group or from a previous situation—*before and after* regulation. For the former however, the further away in time is the counterfactual situation, the highest the probability of finding non-accurate results.

For regulations that have last in the regulatory framework for several years. The analysis may be weaker (quantitative or qualitative), unless an international comparison is possible to conduct. In this case, guidelines with consideration of such situations are also needed. For instance, after 10 years of a regulation prioritize a prospective analysis.

3.3. Public consultation

In some cases, there will be little published information and reviewers may have to rely entirely on stakeholders. However, consultation processes can bring other benefits as well and should be included as a matter of course.

3.3.1. All reviews should involve consultations with affected parties and, to the extent possible, be accessible to civil society

Since the function of an *ex post* review is to evaluate how well a regulation has been performing in practice, it is important to consult at first hand with those directly affected. Also, engaging with civil society more generally can help to balance concerns about costs with a better appreciation of the wider benefits.

Reviews benefit from public/stakeholder participation in three ways.

- First, and most obviously, they provide a means of obtaining *more complete information* about impacts and responses, as well as the opportunity to test preliminary analysis and findings.
- Second, engaging stakeholders can help better targeting reviews in identifying regulations or regulatory areas that might be problematic, i.e. the most burdensome or irritating for regulated subjects (e.g. the Red Tape Challenge). Likewise, "continuous" engagement with stakeholders (e.g. the Danish Business Forum) helps examine regulations on an ongoing basis and identify problematic issues relatively quickly.
- Third, in giving the public the opportunity to express views and make an input to proceedings, it can *build trust* in the review process and even a sense of 'ownership' of the

outcomes, making the implementation of any changes politically easier than otherwise. This is especially important for more sensitive or contentious areas of regulation.

3.3.2. The nature and coverage of consultations should be proportionate to the significance of the regulations and the degree of public interest or sensitivity entailed.

Consultations, done well, can be time-consuming and resource intensive. Given budgetary constraints, they need to be conducted in a manner that elicits necessary information at least cost.

This has implications for both the breadth and depth of consultation activity. Highly technical or complex regulatory areas (e.g. foreign trade regulations) or those with narrow impacts (e.g. related to a particular region) would permit more selectivity in consultation, for example, than regulatory regimes with wider public interest and impact.

The more contentious areas of regulation, such as industrial relations, may require formal proceedings and maximum transparency if they are to satisfy stakeholder expectations and achieve the political benefits noted above.

3.4. Prioritisation and sequencing

Apart from the 'programmed' and 'managerial' review mechanisms, the timing of which will largely be pre-determined, opportunities can usefully be taken to conduct other reviews on an *ad hoc* basis. Indeed, some of the largest gains from reform have resulted from such ad hoc initiatives. (OECD 2011) That said, given limitations on financial resources and, just as importantly, the availability of people with the necessary skills — as well as a need to avoid 'review fatigue' — it is important that any such reviews be carefully chosen and sequenced to maximise benefits over time.

3.4.1. High priority should be given to reviewing regulations that have (a) wide application across the economy or community and (b) potentially significant impacts on citizens or organisations — i.e. 'breadth and depth' — and for which there is (c) prima facie evidence of a 'problem'.

The three criteria need to be jointly satisfied. A regulation that had wide coverage but involved very little impact, may not be worth the trouble, or at least should have lower priority than one that had both breadth of coverage and depth of impact. However, the third criterion is just as important, as the payoff from reviewing even a major area of regulation that is performing well could be expected to be lower than for a less significant one that is not. Moreover, the absence of a perceived problem would likely make it hard to obtain 'buy-in' from stakeholders or the public.

Evidence of regulatory failings (undue costs, distortion of incentives, unintended third-party effects) can usefully be obtained pro-actively via surveys or other consultative mechanisms (a 'stocktake' review for example) as well as in response to complaints that may be made on occasion by those affected. (Examples include the UK Red Tape Challenge, Korea's 'Petition

Drum' reforms, etc.) However, some preliminary testing or vetting of such feedback is desirable to assess its validity and thus ensure that the costs of conducting a review are warranted.

3.4.2. Attention to sequencing is important to maximise the realised gains from reform.

Since the outcome of prioritisation exercises rarely involve much precision, more than one area of regulation will typically have comparable claims. It will commonly not be feasible to review all of them at once and thus other criteria need to come into play.

One relates to any connections between the regulatory areas concerned that could provide a logical reason for doing some before others. For example, a regulation may have effects downstream that relate to other areas of regulation. Normally in such cases it would be preferable to review 'up stream' arrangements first. The regulation of producers versus consumers of energy is a topical example. Regulations designed to reduce carbon emissions can be directed at either and typically do both. However, requirements affecting production may obviate a need to separately regulate consumption.

Secondly, there will be advantages in choosing a sequence of reviews that takes into account the relative difficulty of implementing identified reforms. This could result from complexity, disruption during the transition or (more commonly) political opposition. The expected payoff from different review exercises would obviously differ where the prospect of obtaining necessary political support differ, even if the substantive gains to be had from reforms were identical in each case.

Thus proceeding in areas that face less political opposition or other implementation challenges makes pragmatic sense. However, reviews should not be chosen solely according to this criterion, as this would avoid many of the areas of greatest potential benefit. Opposition to reform may be overestimated, and in any case it can often be reduced by the review process itself, to the extent that a convincing case is made about the gains on offer. (OECD 2010)

3.4.3. There are benefits in reviewing regulations as a group, rather than singly, where the regulations concerned are interactive or operate jointly to achieve related policy objectives.

The object of *ex post* reviews is to determine whether changes to a regulation would achieve better outcomes. Where more than one regulation is involved, and overall outcomes are jointly determined, the regulatory regime will generally need to be reviewed as a whole. Otherwise changes made to parts of a regulatory system may interact with other parts of the system in ways that detract from the intended outcomes. By the same token, if a policy regime contains a mix of regulation and other policy instruments (such as financial transfers) it may be necessary to undertake a wider policy review.

3.5. Capacity building

3.5.1. Having in-house capability in evaluation and review methods is essential, both in order to conduct reviews internally as well as to oversee those commissioned externally.

The goal for public administrators should be to develop and maintain sufficient expertise in evaluation to enable collaborative internal analysis and intelligent external commissioning. This will normally require a 'critical mass' of analysts who can work together and learn from each other, and hence help develop a culture of evaluation.

This need not involve special resourcing, as the skill sets relevant to *ex post* assessment of regulations are largely the same as those required for *ex ante* evaluation or RIA processes.

Capacity enhancement needs to involve training as well as recruitment of appropriate staff, with on-the-job learning an important element.

3.5.2. Consultants can usefully supplement expertise available within government, but how they may best contribute in specific cases needs to be carefully considered and they should not be over utilised to the detriment of internal capability.

External consultants, whether academics or specialist firms, can usefully supplement government expertise where departments are responsible for reviews, particularly when specialised skills are called for (such as in quantitative analysis or survey design and management).

However, consultants should not be relied on to the point of degrading internal evaluation capacity. Some reviews will need to be conducted internally (e.g. because of political or strategic requirements) and, as noted, it is vital for administrations to retain an ability to quality control externally commissioned work.

3.6. Committed leadership

Installing and maintaining regulatory systems consistent with the above principles involves a number of administrative and political challenges. These are more likely to be overcome if governments and political leaders in particular, can demonstrate active commitment.

Initiatives to reduce red tape and improve regulatory quality are often introduced with good intentions, but commitment to good practices can wane over time. Regulatory disciplines, even when self-imposed, can also be sorely tested by 'events' (such as occurred during the financial crisis).

Leadership is instrumental both in establishing the systems needed to secure regulatory quality, and for their effective operation over time. Such arrangements are intended to limit regulatory freedom of action in the interest of securing better outcomes overall. It is natural that there will be some resistance to this, either at the political or bureaucratic levels. Strong leadership is needed not only to overcome such resistance but also to achieve broad acceptance and endorsement.

3.6.1. Support from political leaders is essential to the ongoing effectiveness of systems for the ex post review of regulation.

The reality is that *ex post* reviews inform a government's decisions about regulation, rather than supplanting or pre-empting them. While, as noted, such systems necessarily limit freedom of action initially, the findings and recommendations of reviews ultimately have to be agreed to at a political level.

Most regulations involve an element of experimentation. And many face some opposition. Performed well, regulatory reviews not only help governments determine whether they have turned out as intended, but where changes are needed can help ameliorate the politics. For one thing, as noted, to the extent that unintended policy consequences are avoided, this will obviously mean avoiding the political problems that may result, which can be considerable.

But the political environment can also be improved in other ways. Credible assurance from government that proposed regulations will be reviewed after they are implemented can lessen resistance to them. Further, if reviews are conducted through processes that entail significant public participation, stakeholders may develop a sense of ownership of the review and thus of regulatory changes that may result.

A 'litmus test' for any system of rules is how well it responds to 'force majeure'. There will inevitably be situations in which exemptions are sought from best practice regulatory requirements. There are benefits in having high level gatekeeping to vet such claims, as well as to ensure that reviews will be conducted at a subsequent stage.

Governments are not able to bind the actions of their successors, so bipartisan support for regulatory policy is highly desirable if good practice is to be sustained. This requires agreement among political leaders of different parties that, while policy ideas will always be contested, the core elements of good regulatory process will not. It is incumbent on government leaders to seek to secure such agreement, for which purpose some consultation (if not collaboration) will generally be required.

3.6.2. Senior officials within the bureaucracy need to be vigilant in shaping practice 'on the ground'

While a bureaucracy must take its lead from the government of the day, the extent to which regulatory quality systems are upheld and maintained in practice crucially depends on its own leadership.

It is one thing to agree on certain best practice principles; it can be another to ensure they are implemented as intended. Just as *ex ante* assessments have often been found deficient, or merely to have provided 'backfill' for decisions already taken, *ex post* reviews may be conducted poorly or, worse, arranged such as to provide support for a preordained position. And there is the ever-present risk of a 'tick a box' approach to compliance emerging over time, with form taking precedence over substance.

Such problems have been detected at various times in most jurisdictions. Averting them requires demonstrated commitment by public sector leaders to upholding good process. 'Tone at the top' is widely recognised as one of the key influences on the culture within an organisation, which in turn is a primary influence on behaviour.

It needs to be made clear that practices promoting regulatory quality, including *ex post* reviews, are integral to the department's policy functions. Staff need to see the requirements as part of the job, rather than as an imposition. Active support by senior officials for staff training and the recruitment of suitably skilled people is important to this. The establishment of dedicated evaluation units within a department or ministry can provide further tangible evidence. Such units need to be treated as integral to the organisation's purpose, however, rather than simply being about external compliance.

Senior officials play a key role in advising ministers on a range of policy and administrative matters. These need to include guidance about the procedural requirements for making and reviewing regulation. This can be particularly important when a new minister is appointed, especially if part of a new government that lacks experience in office. And if situations arise where there is a wish to circumvent the rules, it can fall on senior officials to 'speak truth to power'.

These responsibilities are best seen as part of the bureaucracy's wider 'stewardship' role over administrative systems and procedures. Such responsibilities should transcend particular government administrations. The institutional memory needed to assure system performance and continuity resides mainly within the bureaucracy and its leaders are well placed to instruct ministers about best practice requirements, while being responsive to the government's policy agenda.

4

Potential sectors to be assessed in Mexico

In recent years, Mexico has made important reforms in relevant sectors of the country. However, now the government has to analyse if these have had the expected results. This chapter addresses possible sectors where an ex post evaluation of the regulations affecting these sectors should be carried out, the choice of sectors is based on the diagnosis made by the OECD in the report Getting it Right: Strategic priorities for Mexico.

The *ex post* assessment policy of regulations should have clear guidelines prioritizing potential regulations, sectors, timing, strategies, objectives and following steps. Regulations to be assessed must be elected in the very first place according to the requirements embedded in the law. For example, one-in, x-out clause, sunset clause, technical standards validities, etc.

A second round of regulations, subject to an impact assessment should take into account a relevance criterion. Such significance must be defined in specific guidelines, as there is no single measure or indicator that fits all types of regulations. For instance, indicators of economic relevance may differ from social, or technical. Thus, a composite indicator to measure priority of regulations is a potential alternative to undertake a policy to evaluate regulations after the implementation. Elements of the composite indicator may include:

1. Number of regulated firms of individuals subject to the regulation.
2. Number (or proportion) of individuals or firms affected positively or negatively by the regulation.
3. Proportion of the sector in economic or financial terms.
4. Administrative burdens of the regulation (if there is an estimation)
5. Potential direct benefits (or damages) of the regulation in economic terms if stated in the RIA or previous studies.

On the other hand, additional elements that can support the decision over priorities are:

1. Scope of the regulation, national, regional, state-level, local
2. Strategic priorities according to the national plan.
3. Relevance of the sector on international grounds
4. Potential risks

The oversight body of the regulatory process should develop and establish a composite indicator, and take into account decision variables to select and prioritize the assessment of a regulation. As a first standardized exercise for Mexico however, the priority suggested will follow a different strategy. In principle, the establishment of the composite indicator as it, should follow the regulatory process in Mexico and only after a rigorous examination and consultation, it should be operational.

Accordingly, the first set of regulations to be evaluated can be prioritized according to the main topics of the public agenda in Mexico during the last five years. In particular, the potential candidates are the main structural reforms in Mexico as the energy reform, the telecommunications and broadcasting reform, the competition reform, the financial reform and educational reform.

4.1. Mexican structural reforms

Since 2012, Mexico has enacted major structural reforms aimed at strengthening growth, improving well-being and fostering equality. However, even where regulations are rigorously tested before being introduced, not all of their effects can be known with certainty. Besides, the implementation process may affect the results of the potential benefits and is relevant to know of the implementation of the reforms was well-established and then if the brought the expected outcomes. (OECD, 2018[28])

The regulatory endeavour is essentially experimental in nature, depending to some extent on judgments about causal relationships and responses. Hence, it is crucial to carry out an ex-post analysis of these reforms to determine the extent to which these have been realised in practice and the impact—whether positive or negative—they have had, so the government can make amendments or continue the implementation of new reforms.

As mentioned before, performing ex-post analysis of existing regulations not only can help straighten the direction but also can produce important learnings about ways of improving the design and administration of *new* regulations. In this way, ex-post reviews can help the government on the design of future regulation with a more precise focus.

The *2018 OECD Getting it right: Strategic priorities for Mexico* is the most recent country review performed to Mexico. It describes the status of the country in key areas such as education, health, energy and telecommunications—amongst others, as well as states recommendations for further reforms to deliver a higher quality of life for its people.

This country review includes the most recent structural reforms that started in 2012, in which Mexico became the OECD leader in terms of promotion and implementation of reforms. For this report, the analysis in *Getting it right 2018* may help identify the sectors and areas where an ex-post analysis should be performed in the short term as a pilot experiment.

4.1.1. Energy sector

The energy sector was revamped with a package of reforms initiated in 2013. These intended to foster the untapped potential of the electricity, oil and gas markets in Mexico, through opening the oil and gas markets and the liberalisation of the electricity sector. The reforms included the creation of new sector regulators, the strengthening of the state-owned petroleum company (PEMEX), the enable of foreign and domestic investment in oil and gas, the opening of the electric sector to private generation of power, among others. (OECD, 2018[28])

Notwithstanding, the status of the reforms may generate impacts, remaining modifications to regulations are still needed. However, before starting new reforms, the government should implement an *ex post* analysis to identify the elements that have worked so far and those that need to be redesigned.

The energy reform in Mexico encompassed several primary laws and is one of the most important policies put in place, which changed the rules of the game as new participants and institutions are interacting. The Government of Mexico declared that until February, 2018, the energy reform achieved an investment commitment around USD $175 billion for exploration and extraction of hydrocarbons, seismic, gas pipeline, etc. (Gobierno Federal Mexicano, 2018[29]). Thus, the energy reform is a big candidate to evaluate.

4.1.2. Telecommunications and broadcasting sector

The telecommunications reform took place in 2013, allowing a remarkable modernisation in the sector. The objective was to protect consumer interests, by promoting competition to reduce the cost of telecom services and increase access. Because of the reform, the number of mobile broadband subscriptions tripled in three years, prices for mobile services declined by more than 60%, and Mexico's television went from analogue to digital. (OECD, 2018[28])

The 2017 OECD Telecommunications and Broadcast Review of Mexico put forward an extensive set of recommendations to improve even more the sector. During the draft of such report, some of the effects of the reform were notorious but a further and wider scope evaluation may provide the following steps in the agenda to boost the achieved results. On the other hand, it is relevant to identify if the reform brought potential side effects.

4.1.3. Competition playing field

The constitutional reform of economic competition was published on June 11th of 2013 with the aim at contributing in the economic development of Mexico. The reform comprised 1) the creation of specialized competition trials in 2013; 2) a renewed autonomous competition commission with clear rules in the governing body; 3) a new law with legal powers and responsibilities; and 4) a new fine-scheme based on proportionality.

The activity of the competition commission has evolved since the constitutional reform and now this is a stronger institution with clear objectives. This institution has released several documents regarding the relation between competition and welfare, market power and consumers' benefits, as well as the loss of consumers' income due to market power. These are some examples of potential benefits of the reform though; it is relevant to assess a whole-approach of the impact of the reform after five years of operation.

4.1.4. Financial reform

The financial sector in Mexico has improved over the recent years and has strengthened its capacities for providing better services. The financial reform in Mexico was promoted in 2013 and approved and published in 2014. It intended to improve competition on the financial sector, to promote credit through the National Development Bank, to make more efficient the financial institutions, among others (Federal Government of Mexico, 2014[2]).

Some of the most relevant elements of the reform seek to improve the competition in the sector, as strengthening the capacity of the National Commission for the Protection of Users of Financial Services (CONDUSEF), allowing COFECE to investigate competition level of the sector and creating a bureau of financial entities (Federal Government of Mexico, 2014[2]). However, outcomes of the reform have not been measured yet in a systematic way.

As the implementation of the reform has been well advanced and results of it have started to show up, the government has to perform an ex-post analysis of some elements of the reform to verify the impacts and outcomes so far, and make amendments in the cases where it is needed.

4.1.5. Education reforms

Mexico has one of the largest and complex education systems in the OECD. However, it still requires capacity to provide quality education, as well as coverage in some education levels. In 2012, the package of reforms included relevant modifications in the regulatory framework of the educational system (OECD, 2018[4]).

The reforms approved seek to increase the education coverage, the improvement of the teaching and learning conditions, the enhancing of transparency, a renewed consolidated evaluation authority, and the restoring of the national educational system (OECD, 2018[4]).

The reform accounted for an increase in the enrolment rates in upper secondary education of almost 10% in five years—from 2012 to 2017. However, less than 50% of kids with disadvantaged backgrounds enrolled at school, in comparison with almost 94% of advantaged backgrounds. Moreover, as 2018 the learning outcomes are still weak in Mexico, as it holds last place on the OECD evaluation ranking PISA in all tested subjects between member countries (OECD, 2018[4]). Thus, despite the progress and the efforts that achieved, the Mexican education system still faces some major challenges as of inclusion and quality of education in rural areas.

The education reform has achieved some positive outcomes but an integral evaluation of it may produce relevant insights to improve the implementation and plan the agenda.

5

Summary and lessons learned

5.1. Overarching Principles

Regulatory policy frameworks should explicitly and permanently incorporate *ex post* reviews as an integral part of the regulatory cycle.

A sound system for the *ex post* review of regulation would ensure comprehensive coverage of the regulatory stock over time, while 'quality controlling' key reviews and monitoring the operations of the system as a whole.

Reviews should include an assessment of the actual outcomes from regulations against their rationales and objectives, and make recommendations to address any deficiencies.

5.2. System governance

There need to be oversight and accountability systems within government administrations to ensure that key areas of regulation are not missed and that reviews are conducted appropriately.

There are benefits in institutional arrangements that combine oversight of the processes for *ex ante* as well as *ex post* evaluation processes, and do so across the whole of government.

The type of *ex post* review, and its timing or 'trigger', are best determined at the time regulations are made.

5.3. Broad approaches to reviews

A 'portfolio' of approaches to the *ex post* review of regulation will generally be needed. In broad terms, such approaches range from programmed reviews, to reviews initiated on an *ad hoc* basis, or as part of ongoing 'management' processes.

5.3.1. 'Programmed' reviews

For regulations or laws with potentially important impacts on society or the economy, particularly those containing innovative features or where the effectiveness is uncertain, it is desirable to *embed review requirements* in the legislative/regulatory framework itself.

Sunset requirements provide a useful 'failsafe' mechanism to ensure the stock of subordinate regulation remains fit for purpose over time.

Post-implementation reviews within a shorter timeframe (1-2 years) are relevant to situations in which an *ex ante* regulatory assessment was inadequate, or a regulation was introduced despite potential deficiencies or downside risks.

5.3.2. Ad hoc reviews

Public '*stocktakes*' of regulation provide a periodic opportunity to identify current problem areas in specific sectors or the economy as a whole.

Stocktake-type reviews can also employ a common *screening criterion or principle* to focus on specific performance issues or impacts of concern.

'*In depth' public reviews* are appropriate for major regulatory regimes that involve significant complexities or interactions, or that are highly contentious, or both.

'Benchmarking' of regulation can be a powerful mechanism for identifying improvements based on comparisons with jurisdictions having similar policy objectives.

5.3.3. Ongoing stock management

There need to be mechanisms in place to enable 'on the ground' learnings within enforcement bodies about a regulation's performance to be conveyed as a matter of course to areas of government with policy responsibility.

Regulatory offset rules (such as one-in one-out) and Burden Reduction Targets or quotas need to include a requirement that regulations being removed undergo an explicit assessment of their performance.

Review methods should themselves be reviewed periodically to ensure that they too remain fit for purpose.

5.4. Governance of individual reviews

The governance and resourcing of reviews, and the approaches employed, need to be attuned to the nature and significance of the regulations concerned. While needing to be cost-effective, arrangements should be such as to facilitate findings that are well supported and publicly credible.

For many regulations, evaluations are best conducted within the departments or ministries with policy responsibility. Enforcement bodies normally should not conduct reviews themselves, but are uniquely placed to provide information and advice and should be closely consulted.

The more 'sensitive' a regulatory area and the more significant its economic or social impacts, the stronger the case for an 'arm's-length' or independent review process. This in turn requires, at a minimum, that those leading a review are not beholden to the agency concerned, and have no perceived conflicts of interest.

Transparency is paramount for in-depth reviews. Reviews should be publicly announced, with scope for stakeholder input (see *Public consultation*) and the findings/recommendations and the response by government both made publicly available.

5.5. Key questions to be answered in reviews

Appropriateness: reviews should address as a threshold question whether a valid rationale for regulating still exists

Effectiveness: reviews should determine whether the regulation (or set of regulations) actually achieves the objectives for which it was introduced.

Efficiency: reviews need to determine whether regulations give rise to unnecessary costs (beyond those needed to achieve the regulatory goal) or other unintended impacts

Alternatives: reviews should consider whether modifications to regulations, or their replacement by alternative policy instruments, are called for.

5.6. Methodologies

Evaluations should be conducted within a cost-benefit framework that firstly identifies and documents impacts of relevance and then assesses their relative magnitudes.

Quantification should be encouraged where feasible, as it can bring additional rigour to assessments of impacts and potential outcomes.

Data requirements are best considered at the time a regulation is being made, as part of wider consideration of the type of *ex post* review that would be most appropriate.

The observed impacts of a regulation should be compared with 'counterfactuals' —how things would have turned out otherwise.

5.7. Public consultation

All reviews should involve consultations with affected parties, and to the extent possible, be accessible to civil society.

The nature and coverage of consultations should be proportionate to the significance of the regulations and the degree of public interest or sensitivity entailed.

5.8. Prioritisation and sequencing

High priority should be given to reviewing regulations that have (a) wide coverage across the economy or community and (b) potentially significant impacts on citizens or organisations — i.e. 'breadth and depth' — and for which there is (c) *prima facie* evidence of a 'problem'.

Attention to sequencing is important to maximise the realised gains from reform.

There are benefits in reviewing regulations as a group, rather than singly, where they are interactive or operate jointly to achieve related policy objectives.

5.9. Capacity building

Having in-house capability in evaluation and review methods is essential, both in order to conduct reviews internally as well as to oversee those commissioned externally.

Capacity enhancement needs to be underpinned by the training as well as recruitment of staff, with on-the-job learning an important element.

Consultants can usefully supplement the expertise available within government, but how they may best contribute in specific cases needs careful consideration, and they should not be over utilised to the detriment of internal capability.

5.10. Committed leadership

Support from political leaders is essential to the ongoing effectiveness of systems for the *ex post* review of regulation.

Senior officials within the bureaucracy need to be vigilant in shaping practice 'on the ground'.

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