

## *Chapter 2*

### **Institutional capacities for Better Regulation**

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

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

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

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

## Assessment and recommendations

*Considerable progress has been made in a short time, and foundations are being established for the further development of institutional capacities.* Portugal now has institutional structures at the centre of government as well as a network of officials involved and interested in Better Regulation across the administration, who are ready to move forward. The implementation of the *Simplex* Programme has played a big role in raising interest across ministries, and has generated inter-ministerial co-operation for a major horizontal government programme for the first time without a formal legal requirement to do so. Two entities based within the Presidency of the Council of Ministers at the centre of government now play a major role in the development of Better Regulation in Portugal: CEJUR (the legal centre of the Presidency of Council of Ministers in charge of the *Legislar Melhor* Programme), and SEMA (Secretary of State for Administrative Modernisation) with the support of AMA (the Agency for Administrative Modernisation, in charge of the *Simplex* Programme). Among ministries, the Ministry of Justice is a particularly active and effective player with respect to the *Simplex* Programme, partly as an extension of its own initiatives to remove congestion in the judicial system. The Ministry of Finance and Public Administration and the Ministry of Economy and Innovation have been other key players in the development of simplification programmes.

*Despite progress, the institutional motor at the centre of government for Better Regulation has some weaknesses.* One is the need to enhance shared working. There is goodwill and a certain level of co-operation between the main players in the Presidency of the Council of Ministers and key ministries, but much of their work appears to be carried out independently of each other, and may be over-dependent on the enthusiasm of the officials currently in place. This will matter increasingly as new processes are rolled out, for example to capture the administrative burdens of new regulations, which will need to be meshed with the more established *Simplex* Programme. The second major weak spot is capacities and competences. These are inadequate for the work ahead. For example CEJUR has been given an important role for the development of the *Legislar Melhor* Programme, but its capacity to perform these tasks will be limited by its resources and competences, which are focused on law quality. It could not for example, as matters currently stand, provide much effective support for the development of *ex ante* impact assessment. Policies on administrative simplification and on the quality of new regulations are related, and require strongly co-ordinated actions. They are currently conducted by AMA and CEJUR, which are under different Secretaries of State within the Presidency of the Council of Ministers.

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**Recommendation 2.1.** Short of setting up a fully integrated unit, which may cut too much across current structures, Portugal should develop a more co-ordinated approach to Better Regulation within the Presidency of the Council of Ministers so that officials can work together and share experiences on linked issues. At the same time it should consider how resources and relevant competences can be strengthened for CEJUR, so that it can effectively meet its responsibilities for the *Legislar Melhor* Programme.

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*Across ministries and agencies, capacities and competences for tackling reform appear to be highly uneven and also need attention.* There have been considerable efforts to develop training, and an important initiative to link performance assessment with results obtained on Better Regulation policies such as the *Simplex* Programme. Some entities (such

as the Ministry of Justice and the financial regulators) appear to be fully equipped as well as enthusiastic for their role. Others, however, seem less at ease and not so well integrated.

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**Recommendation 2.2. Portugal should identify a high-level committee to take responsibility for Better Regulation, supported by a secretariat in the Presidency of the Council of Ministers, to which ministries would report progress on a regular basis. Within individual ministries, a Better Regulation contact point should be established to liaise with the central structures, co-ordinate reporting, and promote best practice.**

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*The more formal engagement of external stakeholders, many of whom are highly supportive of the government's Better Regulation policies, could also be usefully strengthened.* Leaving aside the Ministry of Justice's De-formalisation Commission, which covers both government and external representatives, Portugal does not at present have a fully independent external advisory body of the kind that has been set up in a number of other OECD countries. Such bodies, provided that they are established with careful regard to their independence and balance of representatives, can provide powerful support for sustaining Better Regulation over the long run, advising the government on how Better Regulation programmes can be strengthened, and acting as an effective public communication channel for the government.

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**Recommendation 2.3. Portugal should consider establishing an independent external advisory body of business and other representatives to support the development of Better Regulation policies.**

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*The government and the parliament have a shared interest in Better Regulation, which needs to be exploited.* The Assembly of the Republic is considerably engaged in Better Regulation initiatives aimed at strengthening the quality of law making, including through early efforts at impact assessment. (This is a key area for sharing developments (of which more in Chapter 4). Sharing of databases on the regulatory stock could be another entry point for encouraging communication and co-operation.

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**Recommendation 2.4. Initiatives should be taken to strengthen the contact and co-operation between the Presidency of the Council of Ministers and the parliament over the development of Better Regulation tools and processes, in particular *ex ante* impact assessment of new legislation, and databases.**

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## Background

### *General institutional context*

#### *Major developments in the institutional structure*

The constitution approved in 1976, following the 1974 revolution, established Portugal as a mixed parliamentary and presidential system.<sup>1</sup> Portugal became a member of the European Union in 1986. The general institutional framework has remained stable over the last decade. Portugal remains highly centralised, although there are growing discussions about delegating responsibilities to the regional level. Box 2.1 provides an overview of the institutional framework for policy and law making in Portugal.

### Box 2.1. Institutional framework for Portuguese policy and law making

Portugal is a parliamentary republic ruled by the constitution of 1976. The President of the Republic is head of state.

Portugal is a unitary state. It has long been characterised by a tradition of strongly centralised government. Local government essentially consists of the municipalities, which are strongly autonomous. Mainland Portugal is also divided into regions, which have no elected body and do not have the status of local governments. There are however two autonomous island regions- Azores and Madeira.

#### The executive

The President of the Republic is directly elected for a 5-year term and re-eligible once. The main powers of the President are the right to appoint the Prime Minister whose programme must win a vote of confidence in the parliament, and the right to call an election (or to appoint a new prime minister) should the government lose the support of the parliament. The President can send bills to the constitutional court for verification that they are in conformity with the constitution. The President is also commander-in-chief of the armed forces.

The President does not hold any executive power but may interfere in political actions, when necessary, by using some of the powers granted by the constitution. They include the power of veto over legislation, the power to dismiss the government and the power to dissolve the parliament.

Executive power is vested in the government (Council of Ministers, chaired by the Prime Minister), which is accountable to the legislature. As in most other OECD countries, policy decisions must be agreed collectively by the Council of Ministers, and are first debated in relevant committees. The Prime Minister is appointed by the President of the Republic. Members of the Council of Ministers are appointed by the President of the Republic upon recommendation of the Prime Minister.

Although the Assembly of the Republic is the most important source of legislative power, the government may enact legislation within the limits of subject areas authorised by the parliament under parliamentary framework laws. The government may also develop the basic principles set out by parliamentary laws, so long as they are not within the exclusive competence of the parliament. Lastly, the government can legislate over all matters that are not within the exclusive competence of the parliament.

The Presidency of the Council of Ministers is a central ministry which provides support for the work of the Council of Ministers. It supervises a number of institutes, such as the National Statistical Office, the High Commission for Immigration and Intercultural Dialogue (ACID), the Centre for the Management of the government IT network, the Agency for Administrative Modernisation, the Legal Centre (CEJUR).

Ministries (14 in the current government) are generally headed by a minister and subdivided into secretariats or Departments, which are headed by a secretary of state.

Civil servants are politically neutral and remain in place even if there is a change in government.

#### The legislature

The Assembly of the Republic (*Assembleia da República*) is Portugal's unicameral parliament. It is composed of 230 members, elected to a 4-year term of office under a proportional representation system (with the vote based on party lists in 20 multi-member constituencies). The parliament exercises the most important legislative powers, including that of amending the constitution. The parliament is entrusted with the power to legislate on all matters, except for those which are the exclusive responsibility of the government

#### The judiciary

The constitution provides for the Constitutional Court, the Supreme Court of Justice and the Supreme Administrative Court (the last two have subordinate courts) and a variety of special courts, including a military court system.

The Portuguese legal and judicial system is based on Roman civil law. It has a complete body of law that has all been transcribed into codes. Judges are essentially seen as civil servants who are the ‘mouth of the law’. They must seek the appropriate law from the codes and apply it without any reservations, excesses, any interpretations.

#### ***Conselho de Estado (Council of State)***

The Council of State is a body established by the constitution to advise the President of the Republic on the exercise of many of his reserve powers. The constitution states that it must be summoned by the President should he decide to dissolve the Assembly of the Republic, declare war or peace, or if a government steps down.<sup>2</sup>

#### **Autonomous regions, municipalities and parishes**

The public sector structure is also composed of autonomous regions and local self-government (municipalities and parishes, as decentralised structures), all of them having a high degree of political and administrative autonomy, defined by the constitution and by law.

There are two autonomous regions, Azores and Madeira, which both have special administrative, political and legislative powers. They have large administrative powers in general matters regarding their specific local lives, economic and social development. Except for these overseas territories, the regions are not a relevant feature of the administrative structure.

The 308 municipalities are politically and administratively independent from state government and have the power to plan, govern and make investments in a range of areas. They play an important role in delivering services and goods to citizens and businesses in areas such as water supply, drainage network, urban waste disposal, parks and gardens, street repairs, social and cultural facilities, primary schools (apart from a teacher’s pay) and municipal road network. They also have responsibilities concerning health, social protection, urban planning and environment. Municipalities’ revenue come largely from grants from the central government and property taxes.

Municipalities also have responsibilities to licensing several activities connected to these issues, to verify the compliance of citizens and businesses with the rules governing these activities, and to give financial support to citizens and businesses in connection to them.

### *Developments in Better Regulation structures*

Development of Better Regulation structures is relatively recent compared with some other OECD countries (the first structure was established in 2001), and has been closely associated with managing the transformation of the public sector. Reflecting the high political attention given by the Portuguese government to the reform of the public sector and in particular to the *Simplex* Programme, responsibility for this transformation has always been at the centre of government, close to the Prime Minister’s cabinet or the Presidency of the Council of Ministers. The different branches of the Presidency of the Council of Ministers have played an increasingly prominent role over time, first with the development of the *Simplex* Programme, and associated e-Government initiatives, and more recently with the development of the *Legislar Melhor* Programme (Box 2.2).

### Box 2.2. Milestones in the development of Better Regulation institutions in Portugal

#### 2001

The government sets up the Commission for Legislative Simplification (Resolution of the Council of Ministers 29/2001).

#### 2003

The government sets up a Technical Committee for the “Strategic Programme for the Quality and Efficiency of the Government’s Rulemaking Acts”.

#### 2005

The government establishes UCMA (*Unidade de Coordenação da Modernização Administrativa* – Unit of Co-ordination of Administrative Modernisation) to provide support and co-ordinate the government’s action in the field of administrative modernisation and simplification (Resolution of the Council of Ministers 90/2005 of 13 May 2005).

#### 2006

The Secretary of State for the Presidency of the Council of Ministers (SEPCM) is given overall responsibility for implementing the *Legislar Melhor* Programme initiated in 2006. CEJUR, the legal centre of the Presidency of the Council of Ministers, is given responsibility for overseeing the implementation of Better Regulation policies. The government also establishes AMA, the Agency for Administrative Modernisation, to provide technical support for the development and evaluation of activities related to administrative simplification and e-Government, including the *Simplex* Programme (Decree Law 202/2006 of 27 October 2006). AMA is placed under the responsibility of the Secretary of State for Administrative Modernisation (SEMA), within the structure of the Presidency of the Council of Ministers.

#### 2007

In June 2007, a Secretary of State for Administrative Modernisation is appointed by Decree Law 240/2007. This replaces UCMA.

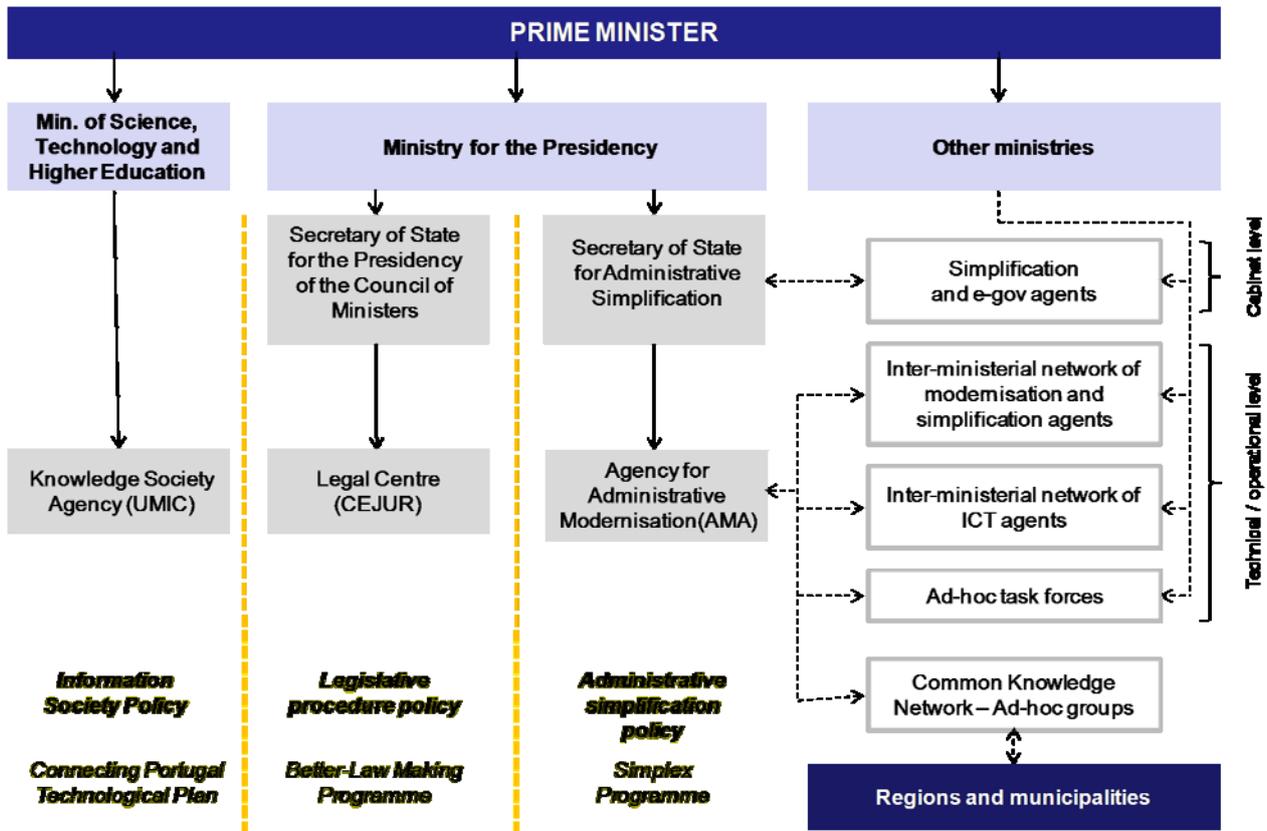
### ***Key institutions for Better Regulation policy***

#### *The executive centre of government*

#### The Presidency of the Council of Ministers

This is the key central Ministry (under the responsibility of the Prime Minister), which provides policy and technical/legal support for the Council of Ministers. Responsibility for the Better Regulation agenda currently lies with the Minister for the Presidency, with two Secretaries of State playing a leading role, the Secretary of State for Administrative Modernisation (SEMA) and the Secretary of State for the Presidency of the Council of Ministers (SEPCM).

Figure 2.1. Institutional framework for Better Regulation policies in Portugal



The Secretary of State for the Presidency of the Council of Ministers (SEPCM) is responsible for implementing the *Legislar Melhor* Programme initiated in 2006 and for co-ordinating the government's rule-making process, acting as a mediator between ministries. The SEPCM collects all proposals for laws and the most important secondary regulations from ministries, and circulates them to other ministries for comment. It reviews the proposals with view to reaching an agreement between ministries, in particular with the Ministry of Finance and Public Administration, before the meeting of the Council of Ministers. However SEPCM has no decision power as only the Council of Ministers has the power to decide that a draft law be sent to the parliament, or to adopt a decree law.

The Secretary of State for Administrative Modernisation (SEMA) has responsibility for administrative simplification and e-Government. It is in charge of co-ordinating and supervising initiatives for administrative modernisation with the operational support of the Agency for Administrative Modernisation (AMA).<sup>3</sup> AMA develops and evaluates activities related to administrative simplification and e-Government, which includes the implementation of the *Simplex* Programme. SEMA co-ordinates with other ministries on policy issues, while AMA operates at a technical or operational level with relevant technical ministry and agencies staff.

The legal centre of the Ministry for Presidency (CEJUR) has been given a key role in the implementation of the *Legislar Melhor* Programme. CEJUR was initially created as a legal source of expertise to the government. In 2007 the government extended its mission as part of the reform programme to modernise the administration. Its main missions include:

- Providing legal assistance to the government in the preparation of draft laws, upon request of a ministry or a secretariat of state;
- Simplifying legislation, both in terms of flows and stock, and managing *Digesto*, which is a cluster of databases on existing regulations;
- Implementing *ex ante* impact assessment in the development of new regulations;
- Providing legal assistance to ministries when a law is sent to the Constitutional Court for verification; and
- Participating in international co-operation over Better Regulation.

### Other key central government players

Other ministries play a specific role in the development and implementation of Better Regulation in Portugal, in particular through the implementation of *Simplex* Programme:

- The Ministry of Justice has been a key participant in the development of the *Simplex* Programme, with the implementation of a wide range of measures for the de-formalisation, elimination and simplification of acts and procedures for companies and citizens in its field of competence (for example, elimination of compulsory public deeds which duplicated public registration, creation of one-stop shop for the creation of a company, simplified marriage procedure).
- The Ministry of Finance and Public Administration has also been a leading ministry in the implementation of the *Simplex* Programme. It also plays a traditional role of scrutiny in the development of regulations which have an impact on the budget.
- The Ministry of Foreign Affairs has responsibility for overseeing transposition of EU regulations into the national legal system. When a text needs to be transposed, it delegates this responsibility to the relevant ministry, and then monitors the transposition process.
- The Ministry of Science, Technology and Higher Education has some responsibilities in the development of e-Government through the Agency for the Information Society (*Agência para a Sociedade do Conhecimento*, referred to as UMIC). UMIC used to be responsible for e-Government policy. E-Government policy is now under the responsibility of SEMA, but UMIC still holds an important role as it is in charge of co-ordinating policies for the Information Society, including through major programmes such as the Technological Plan and the Connecting Portugal Programme.

### *Co-ordination across central government*

#### Networks for the *Simplex* Programme

The *Simplex* Programme has encouraged co-operation between ministries and led to new experiences of collaboration for civil servants in Portugal. This is the first horizontal programme of the government to be implemented throughout all ministries, without any laws requiring ministries to participate. This constitutes a breakthrough in the Portuguese administration, in which ministries traditionally work in a very autonomous way. The progressive implementation of projects, with pilot projects, has helped secure participation

of ministries. SEMA reports directly to the Prime Minister and regularly to the Council of Ministers about progress in the implementation of *Simplex*, which seems to have had a strong disciplinary effect, preventing delays, and to have fostered competition among ministries in implementing the programme.

AMA draws on two inter-ministerial networks with representatives from all ministries, one network for modernisation and simplification, and another one for ICT. Thanks to these networks as well as to various *ad hoc* inter-ministerial task forces or working groups, information flows more easily between ministries than it used to be. The adoption of a life-event approach for defining *Simplex 2008*, which leads to an increased number of cross-ministerial initiatives, has also reinforced the need to co-operate between ministries to ensure coherence of the projects. As initiatives are defined around clusters, involving participation of several ministries in some cases, this can contribute to breaking down organisational silos and gradually promoting a more collaborative culture within the public administration.

The Ministry of Justice has set up a De-formalisation Commission to help it identify areas for the reduction of administrative burdens and bottlenecks in the judicial system. This commission is now considered as a major player in the administrative simplification initiative. It is noteworthy for the fact that it covers stakeholders both from within and outside government (business associations, regional chambers of commerce, professional representatives, trade unions, consumers).

#### Other networks

Informal regular co-operation between ministries also takes place, not only for the implementation of the *Simplex* Programme but more generally for issues relating to Better Regulation. The various programmes related to public sector reform have been addressed through separate networks and committees. This has been partly compensated by informal co-operation between the Ministry of Justice, the Ministry of Finance and Public Administration, and the Presidency of the Council of Ministers.

#### *Regulatory agencies*

As in other OECD countries Portugal has established a range of agencies with varied tasks and responsibilities. There are two broad categories. The first comprises seven independent regulators which cover the financial and insurance sectors, competition policy, communications, energy, and health care (see Box 2.3). The organisation, functions, and powers of each agency are defined by the specific laws which set them up, but they share some common features relating to their powers and responsibilities. They:

- Elaborate and adopt secondary regulations in cases specified by law and when shown to be indispensable for the exercise of their responsibilities; collaborate with the Assembly of the Republic and with the government in the formulation of the policies and the law relative to their sector;
- Monitor the development of activities of the entities under their oversight; disseminate information, publish studies; and
- Monitor compliance with the law and applicable regulations in the sector; give orders and formulate recommendations, initiate and accompany cases to punish infractions; impose sanctions.

These regulatory agencies are independent public institutions. They have administrative and financial autonomy, but are accountable to the relevant parent ministry for the sector. The parent ministry must approve their annual forward-looking activity plan and budget and they must submit an annual activity report and accounts for the previous year. Some agencies (in the financial sector for example) have developed their own Better Regulation initiatives. It is important that these initiatives remain inspired by the general framework defined by the government. Otherwise the multiplicity of programmes could lead to confusion for businesses and citizens.

### Box 2.3. Independent regulatory authorities in Portugal

Portugal has seven independent regulatory agencies.

**The Bank of Portugal** (*Banco de Portugal*) is responsible for the prudential supervision of credit institutions and financial companies, and for the supervision of their conduct in the retail market.

The **Portuguese Securities Market Commission** (CMVM – *Comissão do Mercado de Valores Mobiliários*), which was established in 1991, is charged with supervising and regulating securities and other financial instrument markets, as well as the activity of all those who operate within these markets.

The **Portuguese Insurance and Pension Funds Supervisory Authority** (ISP – *Instituto de Seguros de Portugal*) is responsible for the regulation, inspection and supervision in the markets of insurance, reinsurance, insurance intermediaries and pension funds, as well as connected or complementary activities. It is subject to the authority of the Ministry of Finance.

**The National Regulatory Authority for Communications** (ANACOM – *Autoridade Nacional de Comunicações*) is the regulatory body for electronic communications and postal services. Its framework was initially defined by Decree-Law 309/2001. It was modified by Law 5/2004 as a result of the transposition of the 2002 EU directives on electronic communications.

The **Energy Services Regulatory Authority** (ERSE – *Entidade Reguladora dos Serviços Energéticos*) is Portugal's regulatory authority for the electricity and natural gas sector. It was created by Decree Law 187/95 as the Regulatory Entity of the Electric Sector, and started its operations at the beginning of 1997. Its scope of activity was extended to the regulation of natural gas by Decree Law 97/2002, within the context of the 1998 EU Directive on the natural gas market.

The **Competition Authority** (*Autoridade da Concorrência*) was created in 2003. It has regulatory powers on competition over all sectors of the economy, including the regulated sectors. In this case the Competition Authority co-operates with the regulatory authority of the relevant sector.

The **Health Authority** (ERS – *Entidade Reguladora da Saúde*) is responsible for the regulation and supervision of the activities of health care providers. This includes ensuring right of universal and equitable access to public health care, ensuring competition among health care providers (in collaboration with the Competition Authority), monitoring quality of care.

The administration in Portugal also has a number of other agencies and institutes, responsible for monitoring, assessing and regulating activities in a given area (including inspections). In most cases these entities are endowed with administrative autonomy but remain within the hierarchical control of their parent ministry. Examples are the National Authority of Medicines and Health Products (*Infarmed – Autoridade Nacional do Medicamento e Produtos de Saúde*), which is accountable to the Health Ministry, and the Portuguese Environmental Agency (APA – *Agência Portuguesa do Ambiente*) which is accountable to the Ministry of the Environment.

### *The legislature*

As is the case in most other OECD countries, the parliament has a structured system for the review of draft laws for enactment. It uses public hearings, and seeks views from a range of stakeholders including the unions, independent experts, and specialised bodies. The Assembly of the Republic has also taken initiatives in the field of Better Regulation. This has focused on promoting transparency and access to the law making process through the use of ICT tools. The website of the parliament provides an impressive amount of up-to-date information on the preparation of laws (discussion in committees, *rapporteurs'* reports, etc.) and allows citizens to interact directly with the parliament. Another focus is with respect to quality processes for the development of draft laws for enactment by the parliament, including *ex ante* impact assessment (see Chapter 4). These initiatives are mostly driven by the 1<sup>st</sup> Committee (Constitutional Affairs, Rights and Liberties) and the 11<sup>th</sup> Committee (Labour, Social Security and Public Administration).

### *The judiciary*

The judiciary has not played so far a significant role in the development of Better Regulation policies. However the need to reduce lengthy delays in court has led the government to take regulatory measures in that area (see Chapter 6).

### *Local levels of government*

Municipalities are the main level of local government in Portugal. The country is one of the most centralised countries in the OECD, with local governments accounting for less than 15% of government revenues and spending. There is also a regional level, but the mainland regions have no elected body and no formal powers. The islands of Azores and Madeira are the exception, and have been endowed with the status of autonomous regions since 1976. Better Regulation policies are beginning to reach out to the regional and local levels. Azores and Madeira have their own programmes. The *Simplex* Programme is beginning to draw in the mainland municipalities, and some of the bigger cities have started their own initiatives too. (For more see Chapter 8).

### *Court of Auditors*

The Court of Auditors (*Tribunal de Contas*) is the senior body with authority to scrutinise the legality of public expenditure and judge public accounts. It is endowed with independence by the constitution, which includes it on the list of courts, qualifying it as a sovereign body. It performs *a priori*, concomitant or *a posteriori* financial control on public entities, on request of the Assembly of the Republic as well as the government.

### ***Resources and training***

The number of public officials directly involved in Better Regulation is estimated overall at 57. SEMA and AMA employ 7 persons on the *Simplex* Programme. CEJUR has a staff of 40 people (12 of whom are lawyers and 12 working on the *Digesto*, the online legal database). Its capacity to fully develop its responsibility for Better Regulation policies (such as the development of *ex ante* impact assessment) seems limited given resource constraints (its core activity remains the provision of legal assistance to the government) and by the lack of relevant competencies (notably economists). SEPCM has a staff of 10 people.

Portugal has specialised training centres for public servants. The most important training centre is the National Institute for Administration (INA – *Instituto Nacional de Administração*), which is responsible for the development of training courses, formal

certification courses, and academically-oriented courses on the Portuguese public administration, as well as an annual course on law making. Universities also provide training to meet increasing demand for ICT expertise.

Efforts to train civil servants have increased over the past few years. INA's annual course on lawmaking has been opened to civil servants and the staff of Ministers and Secretaries of State as well as parliamentary staff. The Faculty of Law of the New University of Lisbon, which has established a monitoring centre on Better Lawmaking, also organises regular training programmes, often tailored to adjust to the needs of individual ministries. The Faculty of Law of the University of Lisbon has a post-graduation course on lawmaking and the legislative process.<sup>4</sup> Some ministries have organised their own training programmes for staff. One example is the Ministry of Justice, which has trained almost 10 000 employees in relation to the initiatives on deeds and notaries. A number of training programmes have also been conducted in the tax administration. Training of civil servants of municipalities appears more limited, although ICT training has taken place for example as part of the Digital Cities and Regions projects (OECD, 2008c).

Development of Better Regulation policies has also involved changes in administrative culture. Adapting skills and resources was reported to the OECD team as a serious challenge to the effective implementation of the *Simplex* Programme and the *Legislar Melhor* Programme. There are however encouraging signs that these programmes have resulted in a shift of the regulatory culture, towards less regulatory interference in the economy. This is a two-way process as changes in the regulatory culture also support the development of Better Regulation policies.

These changes come in the context of an in-depth reform of public administration, which includes control of admissions and recruitment, and a reform of careers and remunerations. The system in place had close to 1 470 different professional careers, with almost automatic career progression and seniority-based pay rise mechanisms, independent of professional performance. Following the adoption by the parliament of a law in July 2007,<sup>5</sup> the government has started to put in place elements of a performance-based management system in 2008. As an example, for civil servants involved in the *Legislar Melhor* Programme and the *Simplex* Programme, performance can be assessed based on results obtained in the implementation of these programmes.

## Notes

1. Portugal was a monarchy between the 12th century and 1910 when the first republic was established. It was overthrown in 1926 and Portugal experienced a period of authoritarian dictatorship until 1974. In this period the state managed the political and economic activities of the country. Decision-making power was highly centralised in a small state apparatus.
2. Its members are: the President of the Republic, the President of the Assembly of the Republic, the Prime Minister, the President of the Constitutional Court, the Presidents of the Regional Governments of Azores and Madeiras, former elected Presidents of the Republic, 5 members designated by the President of the Republic,

5 members designated by the President of the Assembly of Republic, the Secretary of the Council of State.

3. Until 2007 the entity in charge of public sector reform was the Office of Public Services Reform – *Unidade de Coordenação da Modernização Administrativa* (UCMA) – which was under the responsibility of the Minister of State and Internal Affairs.
4. Since its creation in 2004 the course has been attended by approximately 400 people, many of whom civil servants.
5. Law 66-B/2007 of 28 December 2007.



## Chapter 3

### Transparency through consultation and communication

Transparency is one of the central pillars of effective regulation, supporting accountability, sustaining confidence in the legal environment, making regulations more secure and accessible, less influenced by special interests, and therefore more open to competition, trade and investment. It involves a range of actions including standardised procedures for making and changing regulations, consultation with stakeholders, effective communication and publication of regulations and plain language drafting, codification, controls on administrative discretion, and effective appeals processes. It can involve a mix of formal and informal processes. Techniques such as common commencement dates can make it easier for business to digest regulatory requirements. The contribution of e-Government to improve transparency, consultation and communication is of growing importance.

This chapter focuses on two main elements of transparency: public consultation and communication on regulations (other aspects are considered elsewhere in the text – for example appeals are considered in Chapter 6).

#### Assessment and recommendations

##### *Public consultation on regulations*

*Consultation processes are well established, both through formal rules and in practice, and have been evolving.* Although public consultation is not required for all regulations, in practice most regulatory projects are subject to some form of consultation. There is a well-established practice of formal consultation of specific stakeholders stemming from constitutional requirements. An important transition has taken place over the last couple of years, from reliance on formal requirements to experiments with broader and more flexible forms consultation, often based on the Internet, carried out by different ministries and agencies. In particular, the implementation of the *Simplex* Programme has provided the opportunity to develop new forms of consultation with external stakeholders, which can be considered as a successful experience.

*The new legal framework for consultation together with the planned Code of Good Practice are positive steps towards promoting more effective, open and user friendly consultation across all ministries, not just the best performers.* The quality and scope of consultation practices appear to vary across ministries, and open consultation is not yet fully embedded. The government is now preparing a new legal framework and a Code of Good Practice, which should help to promote good practices. There is a particular need to

promote more user friendly deadlines, and provide more systematic feedback on the results of consultation, so as not to discourage those who are putting big efforts in the provision of comments. Public consultation usually takes place within short deadlines and at a late stage in the development of regulations, which does not allow stakeholders sufficient time to contribute and reflect on how they could be affected. Nor does it encourage public ownership of the policy under development. Feedback on the use made of comments also appears to be poor.

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**Recommendation 3.1. Portugal should ensure that the new legal framework and Code of Good Practice under development includes clear instructions to consult early in the process of developing regulations and to provide feedback.**

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### ***Public communication on regulations***

*Portugal has also made positive progress in enhancing access to the legislative stock and more generally to the administration, making a strong use of ICT in doing so. The *Digesto* initiative, and other initiatives to enhance transparency of the rule making process (Official Gazette on line, website of the Assembly of the Republic and individual ministries) show that Portugal has understood the need for a more transparent approach tailored to the needs of business and citizens without a legal background or support. The launch of comprehensive portals for citizens and business has also transformed access channel to public services and administrative procedures. Business might welcome increased simplicity through the adoption of common commencement dates as it can avoid the need to be on a regular lookout for new or revised regulations.*

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**Recommendation 3.2. As well as current initiatives under the *Legislar Melhor* Programme, consideration should be given to establishing common commencement dates for the introduction of new regulations.**

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## **Background**

### ***Public consultation on regulations***

#### *Consultation required by the constitution or by law*

Public consultation during the development of new regulations in Portugal has traditionally been a somewhat formal process. It has been largely driven by legal requirements, many of them stemming from the constitution of 1976, which ensured that consultation was given a considerable role in lawmaking. The introduction of formal requirements for external consultation in the constitution constituted a breakthrough in the development of regulations in Portugal and was part of the democratisation process. The constitution defines the domains in which consultations are inescapable and institutionalised. For example, consultations are enshrined in labour market negotiations. For matters not listed in the constitution, consultation of specific stakeholders can also be mandated by specific laws.<sup>1</sup> In addition, the Rules of Procedure of the Council of Ministers<sup>2</sup> determine the bodies responsible for holding the consultation and the identity of stakeholders to be consulted. They also provide for the possibility of open consultations on the government's official website.<sup>3</sup> The Rules of Procedure of the Assembly of the Republic define what type of consultation is to take place and when, which mostly deal with the phases of the parliamentary legislative procedure when consultation is to take place.

### *General management of public consultation*

There is no overall oversight on consultation procedures, and few specific rules governing the way that the process of consultation is carried out. Each ministry is responsible for making consultations, except when the draft regulation has an impact on the autonomous regions. In this case the Presidency of Council of Ministers co-ordinates the process. This means that the people and organisations consulted may vary widely according to the ministry undertaking the process. Nevertheless, some trends can be observed:

- Open public consultations tend to take place at a rather late stage of law making, once the government has finalised the draft.
- Consultation has been mainly developed for draft primary regulations, and seems more limited when it comes to secondary regulations.
- Reporting results is up to individual ministries. In many cases results of the consultation do not give rise to specific reports and stakeholders participating in the consultation process can only deduct results from the ensuing legislation published in the Official Gazette. They may not be told about the entities consulted and the concerns raised in the consultation process. This can limit the capacity of stakeholders to provide inputs to consultation processes, and jeopardise their interest in participating in consultation. There are however notable exceptions. The government has prepared reports on consultation on the *Simplex* Programme and published them on the Internet.
- As regards deadlines, the Code of Administrative Procedures,<sup>4</sup> which regulates the management of secondary regulations, provides for a minimum of 10 days when specific stakeholders are consulted in writing. The 10-day deadline seems also to prevail in case of restricted consultations on draft primary regulations. In case of large open consultation processes the consultation can take several weeks. In the case of the *Simplex* 2007 and *Simplex* 2008 the consultation period extended over 3 weeks.

### *Consultation of the social partners*

The Portuguese government also consults social partners and civil society through the Economic and Social Council (CSE, *Conselho Económico e Social*), which was created in 1991 based on a constitutional requirement. CSE's mission is to advise the government, promote the involvement of economic and social players in the government's decision-making process, and provide a forum for dialogue between social partners and other civil society organisations. In the course of this work the CSE draws up opinions on draft legislation and economic policy programmes submitted to it by the government or on its own initiative. Members include representatives of the government, workers' and employers' organisations, the autonomous regions and municipalities, as well as representatives of civil society (such as professionals, researchers and universities, consumer and environment associations, universities).

### *Development of new forms of public consultation*

In the last decade the Portuguese government has extended the scope of consultation to new fields and new stakeholders, thereby going beyond constitutional requirements and established representative bodies. The initiative for open consultation has relied on individual ministries, and varied across ministries. Several ministries have led open consultations, using the Internet and in some cases creating dedicated websites for

consultation. The Ministry of Environment has, for example, a well-established practice of open consultation. At this stage there is however no common framework in the government for publicising consultation notices and comments in a systematic way. The parliament has also made specific efforts to develop consultation, along with the publication of draft laws and related documents on its website.

Open consultation is also usually more established in independent regulatory agencies, which have a more recent administrative culture and work in specialised areas where stakeholders can be more easily identified. The energy regulator, ERSE, is often referred to as a best practice in this respect. ERSE has two permanent consultative bodies, the consultative council and the tariff council, which it consults when preparing secondary regulations. These bodies are made up of consumer and business representatives. Comments of the bodies are made public, as well as the consultation papers. ERSE has to answer all comments and publicise its answers. It also conducts open public consultation through its Internet website.

The elaboration of the *Simplex* Programme has led to experiences in open consultation procedures across all ministries. In 2007 the government introduced public consultation in the preparation of the programme and publicised the draft programme for comments. It also held consultation for the preparation of *Simplex 2008*.<sup>5</sup> The process of consultation involved all ministries. AMA co-ordinated the process and compiled results, but comments were dispatched to relevant ministries. Overall the government received numerous comments, demonstrating support and demand for reform in that area. A significant number of measures in *Simplex 2007* and *Simplex 2008* (around a quarter according to SEMA) were identified out of these comments and suggestions (see Box 3.1).

### Box 3.1. Consultation for the preparation of *Simplex 2008*

SEMA conducted a public consultation procedure for the elaboration of *Simplex 2007* and *Simplex 2008*.

Consultation on *Simplex 2008* took place over a three-week period, from December 21, 2007 to January 15, 2008. SEMA published a call for comments on its website and the government's portals. The process was fully open, with no requirement of membership in representative organisations.

The consultation was based on a document spelling out measures envisaged by each ministry to simplify administrative procedures for businesses and citizens during 2008. Participants were invited to comment on measures included in the document, but also to suggest new measures. SEMA sent the comments to the relevant ministries, which had an obligation to reply to comments and suggestions, as well as elaborate and publicise a final report with analysis of the results of the consultation. SEMA published a synthesis report on the consultation process on its website (Presidency of the Council of Ministers, 2008a).

The objective of the consultation was to inform citizens on the government's programme, receive comments and suggestions on planned initiatives, use this input to integrate new initiatives, and redraft or eliminate some measures. The underlying objective was also to promote a more open and transparent relationship between the government and citizens and businesses.

Ministries received 515 suggestions, out of which 65 were integrated in the final version of *Simplex 2008* (7 as new measures, 54 as amendments on planned measures, and 4 as amendments to existing measures). This accounts for 34% of the measures in the final *Simplex 2008*. 54 suggestions were also considered for future *Simplex* programmes. Most of the remaining suggestions were disregarded because they were not simplification measures (such as questions or claims). Others were not considered either because they were already in *Simplex 2006* or *Simplex 2007*, or because they were not feasible.

An example of new measures integrated in *Simplex* 2008 following the consultation process is the simplification of communication between businesses and central government (allowing electronic transmission of information for registration to the tax administration and social security administration, update of commercial register, ensuring valid amendment to these updates).

The Ministry of Justice, which is a leading institution in the implementation of the *Simplex* Programme, has established a specific consultation process for this. In July 2005 it set up the Commission for the Simplification of Registry and Notary Acts, also known as the De-formalisation Commission, to help it identify areas for reduction of administrative burdens and bottlenecks in the judicial system. This Commission is now considered a major player in the administrative simplification initiative. It comprises 28 organisations, which cover a broad scope of stakeholders (ministries and regulatory agencies, business associations, regional chambers of commerce, professional representatives, trade unions, consumers). Over the past three years the De-formalisation Commission has met on a monthly basis and suggested initiatives to simplify administrative procedures to the Ministry of Justice. This experience could be extended to other fields as SEMA plans to set up regular panels to consult on the *Simplex* Programme.

#### *Current initiatives to promote public consultation*

The *Legislar Melhor* Programme takes account of the increasing importance of the involvement of stakeholders and the public in the policy-making process, and foresees the development of new procedures of open consultation, using the Internet. It provides for the elaboration of a new legal framework on public consultation in the development of new regulations, and the production of a code of practice on regulations. Both the new legal framework and the code of practice are currently under preparation.

The objective of the planned new legal framework is to promote the participation of stakeholders in the development of regulations by giving more certainty in the consultation process and making it more fluid and easy to administer. The government plans to establish formal open or direct consultation procedures for organisations and individuals, either public or private, in the elaboration of laws without prejudicing informal consultations. For examples, it will define rules regarding relevant information to be added to the project when launching consultation, publication of draft regulations, deadlines, format of responses.

The planned Code of Good Practice is intended to be a reference tool for both civil servants and stakeholders, and will not have a binding character. It sets out to create an integrated approach to consultation, encouraging officials to publicise the process and launch it as soon as possible to maximise the benefits it can bring. The Code is to provide guidelines on both formal and informal consultation, considering the latter as a complement to formal consultations to be used from the start of the making process of regulations and throughout the consultation process. Through the Code, the government also aims at better managing relationships with stakeholders and increasing the transparency of the consultation process, by encouraging officials to provide reports on the consultation and feedbacks on how comments are taken into account.

### ***Public communication on regulations***

#### *Publication of regulations*

As required by article 119 of the constitution, all regulatory acts are published in the Official Gazette (*Diário da República*). This includes laws enacted by the Assembly of

Republic and the Legislative assemblies of the autonomous regions, executive laws and regulatory orders and other decrees issued by the government, rules of procedures of the Assembly of the Republic, the Council of State and the regional assemblies, as well as decisions of the superior administrative court. Unless otherwise specified in the text, the new regulations enter into force five days after publication in the Official Gazette.<sup>6</sup> In addition to this formal requirement, in some cases, individual ministries send information directly to affected parties in the framework of regular institutional contacts. There is no systematic approach to such communication of information, and practice can consequently vary across ministries.

In 2006 the government undertook to reform the Official Gazette, as part of the *Legislar Melhor* Programme. The online version of the Official Gazette, which had been developed since the 1990s, was given full-legal value in July 2006. As of 1 January 2007, paper was eliminated both for the publication of the journal itself and for the transmission of official texts for publication in the Official Gazette. The online version of the Official Gazette is free of charge, with search, storage and printing capabilities.<sup>7</sup> The transition from paper to electronic publication first required to give full-binding legal force to the online version of the Official Gazette.<sup>8</sup> The government estimated that transition to electronic transmission would save EUR 4 million related to publication and distribution costs.

### *Central registry of regulations*

The launch of the electronic version of the Official Gazette has been closely associated with the development of an online central registry of regulations. The government created a comprehensive legal database, “*Digesto*”, at the end of 1992 to facilitate access to existing regulations. The *Digesto* offers several degrees and types of information.<sup>9</sup> The online version of the *Digesto* database was integrated in the Official Gazette’s website in September 2006. Consultation of this database is free of charge. A subscription service is available for more advanced research capabilities and information. The Presidency of the Council of Ministers plans to create further dynamic hyperlinks to other legal databases (such as those of the Assembly of the Republic, Constitutional Court, and independent administrative bodies) and to set up a specific database for the consolidation of legislation.

Online registries of regulations also exist at the level of ministries and specialised bodies, such as independent regulators or other administrative bodies. In some cases, these databases are extremely comprehensive. For example, the registry of the Environment Ministry includes EU primary and secondary regulations, as well as jurisprudence and administrative decisions.<sup>10</sup> Other examples include the databases of the Ministry of Justice, which were recently renewed with a thematic organisation,<sup>11</sup> the Ministry of Agriculture,<sup>12</sup> the Ministry of Economy and Innovation,<sup>13</sup> and the Ministry of Education.<sup>14</sup> Regulatory agencies also publicise information on regulations in their specific area of activity on their websites.

### *Portals*

As part of its programme for e-Government, Portugal has launched comprehensive portals for citizens and business, which aim at facilitating relationships with the administration and providing a privileged access channel to public services and administrative procedures. The Citizens Portal and the Business Portal provide a single point of access to a wide range of 100 public organisations and entities, and gives the possibility to find information and obtain a number of certificates. The range of online services for citizens should be expanded with the development of the Citizens Card. The Card is an electronic identification document, which can be used for electronic

authentication when accessing public electronic services. The Citizens Portal and the Business Portal are managed by AMA.

## Notes

1. Some individual laws provide for mandatory consultation of specific stakeholders when the planned regulation affect them, such as the National Association of Municipal Authorities, environmental organisations, public professional associations such as the Portuguese Bar Association, the Portuguese Chamber of Solicitors, or the Portuguese Association of Medical Doctors.
2. Established by Resolution of the Council of Ministers 64/2006.
3. [www.portugal.gov.pt](http://www.portugal.gov.pt).
4. Decree Law 442/91 of 15 November 1991, “Code of Administrative Procedures”.
5. In the initial stage of the programme in 2006, the government did not hold formal consultation although some simplification measures, which required adoption of a new law, were submitted to consultation.
6. Law 74/98 of 11 November 1998, relating to the publication, identification and form of laws, amended by Law 2/2005 of 11 November 2005, Law 26/2006 of 30 June 2006, and Law 42/2007 of 29 August 2007.
7. [www.dre.pt](http://www.dre.pt).
8. Decree Law 116-C/2006 of 16 June 2006 established that the Official Gazette will be published by electronic means and made available as a public service with free and universal access. Legal value of the electronic edition of the Official Gazette resulted from Law 26/2006 of 30 June 2006, which amended Law 74/98 relative to the publication, identification and formulation of laws.
9. The *Digesto* includes detailed information on the legal and regulatory acts published in the official gazette (through the PCMLEX database), information on collective labour agreements (REGTRAB database, compiled by the Ministry of Labour), administrative and budgetary opinions of the Directorate-General for Public Administration (DGAP OPINIO) and the Directorate-General of the Budget (DGO DOUT).
10. SIDDAMB Integrated System for Environmental Information at: [www.siddamb.apambiente.pt](http://www.siddamb.apambiente.pt).
11. [www.dgpj.mj.pt/sections/leis-da-justica](http://www.dgpj.mj.pt/sections/leis-da-justica).
12. [portal.min-agricultura.pt/portal/page/portal/MADRP/PT/servicos/guias\\_uteis/legislaca](http://portal.min-agricultura.pt/portal/page/portal/MADRP/PT/servicos/guias_uteis/legislaca).
13. [www.legislacao.min-economia.pt](http://www.legislacao.min-economia.pt).
14. [www.min-edu.pt/np3/133](http://www.min-edu.pt/np3/133).