OECD Reviews of Regulatory Reform

# Regulatory Policy in Peru

## ASSEMBLING THE FRAMEWORK FOR REGULATORY QUALITY




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# *Foreword*

Peru has experienced extraordinary progress in the past two decades. The introduction of macroeconomic reforms and more effective social programmes in the 1990s and 2000s have led to significant improvements in economic growth, well-being and poverty reduction. To continue on this path, Peru has made regulatory policy a critical element of its development strategy and asked the OECD for support in enhancing its current policies and adopting best international practices on regulatory quality.

The *OECD Review of Regulatory Policy of Peru* assesses the policies, institutions, and tools employed by the Peruvian government to design, implement and enforce high-quality regulations. These include administrative simplification policies, *ex ante* and *ex post* evaluation of regulations, public consultation practices, and the governance of independent regulators. The *Review* provides policy recommendations based on best international practices and peer assessment to strengthen the government's capacity to manage regulatory policy.

Peru has many elements of sound regulatory policy in place. For instance, agencies and ministries have the obligation to perform a cost-benefit analysis for specific sets of draft regulation, and to make these drafts available to the public. A broad administrative simplification programme covers the central and subnational levels of government. However, Peru still faces many challenges in creating an overall high-quality regulatory framework. To address these challenges, the review recommends several steps, including instituting a policy on regulatory quality to bring together and boost the elements already in place, creating an oversight body, establishing a system of regulatory impact assessment, and measuring and reducing administrative burdens from formalities.

Data and information for the review were collected from detailed questionnaires completed by the Peruvian government in May 2015; meetings and interviews conducted in 2015 with selected Peruvian government agencies, local governments, and other stakeholders; and other publicly available sources. Information presented in the review reflects the situation as of May 2016.

This review was carried out as part of the OECD Peru Country Programme. The Programme enables the sharing of OECD standards and good practices with Peruvian authorities, suggests priorities for future reform, and allows Peru to learn from the experience of OECD countries. The *OECD Review of Regulatory Policy of Peru* was prepared under the auspices of the OECD Regulatory Policy Committee by the OECD Public Governance and Territorial Development Directorate.

The review methodology draws on two decades of peer learning reflected in the *2012 Recommendation of the OECD Council on Regulatory Policy and Governance*, the first international instrument to address regulatory policy, management and governance as a whole-of-government activity. The Recommendation identifies the measures that governments can and should take to implement systemic regulatory reform.

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This report includes the inputs and feedback from peers from the country members of the OECD Regulatory Policy Committee, who actively participated in the fact-finding missions to Peru and provided key inputs throughout the development of the review: Tony Simovski, Acting Deputy Executive Director, Office of Best Practice Regulation (OBPR), Department of the Prime Minister and Cabinet, Australia; Nathan Frey, who at the time was Senior Advisor, Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget, United States of America; and Eduardo Romero Fong, who at the time was General Coordinator of Regulatory Impact Assessments, Federal Commission for Regulatory Improvement (COFEMER), Mexico.

The project was managed by Manuel Gerardo Flores, Senior Economist of the OECD Regulatory Policy Division. The following team members took primary responsibility for different sections of the review: Manuel Gerardo Flores, Javier Illescas (external expert) and Juan Jose Martinez (external expert) for Chapter 1; Andres Blancas, Alberto Morales

and Manuel Gerardo Flores from the OECD Regulatory Policy Division for Chapters 2, 4, 6 and 7; and Jorge Velazquez (external expert) and Manuel Gerardo Flores on Chapters 3 and 5. Delia Vazquez, Itzel de Haro, Adriana Garcia and Monica Alcala from the OECD Regulatory Policy Division; Carolina Agurto who at the time was in a traineeship in the OECD Regulatory Policy Division; and Lubinda Velasques (external expert) contributed significantly throughout the report. Luiz de Mello, Celine Kaufmann, and Andrea Uhrhammer provided feedback to improve drafts of the report. Administrative assistance was provided by Deborah Barry-Roe and Mariama Diallo, and Jennifer Stein co-ordinated the editorial process.

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# Acronyms and abbreviations

| | |
|---|---|
| **ALDP** | Digital Legislation File of Peru |
| **ANC** | National Competitiveness Agenda |
| **BCR** | Central Bank of Peru |
| **CBA** | Cost-Benefit Analysis |
| **CCI** | Intra-Governmental Co-ordination Council |
| **CCV** | Vice-Ministerial Coordinating Council |
| **CEB** | Commission of Elimination of Bureaucratic Barriers |
| **CNC** | National Competitiveness Council |
| **COPRI** | Private Investment Promotion Commission |
| **CPP** | Political Constitution of Peru |
| **DGAECYP** | General Directorate of International Economy, Competition and Productivity Affairs |
| **DGDOJ** | General Directorate of Legal Framework and Development |
| **DPO** | Decentralized Public Organisms |
| **DSSA** | Supreme Decree No. 007-2011-PCM on Administrative Simplification |
| **FDI** | Foreign Direct Investment |
| **GDP** | Gross Domestic Product |
| **GTUPA** | Guide for the Application of Unique Text of Administrative Procedure |
| **HHI** | Herfindahl-Hirschman Index |
| **IADB** | Inter-American Development Bank |
| **INDECOPI** | National Institute for the Defence of Free Competition and Protection of Intellectual Property |
| **ICT** | Information and Communications Technologies |
| **ITSE** | Operating Licences and Technical Inspections on Edification Security TUPA |
| **LFCE** | Law of Exterior Commerce Facilitation |
| **LMMGE** | Framework Law of the Modernisation of the State Management |
| **LMOR** | Framework Law on Regulatory Agencies for Private Investment |

| | |
|---|---|
| **LMPSI** | Framework Law for Legislative Production and Systematization |
| **LOFMJDH** | Organisations and Functions of the Ministry of Justice and Human Rights Law |
| **LOM** | Organic Law of Municipalities |
| **LOPE** | Organic Law of the Executive Branch |
| **LPAG** | General Law of Administrative Procedures |
| **MAC** | Better Citizen Services Platform |
| **MEF** | Ministry of Economy and Finance |
| **MINCETUR** | Ministry of Foreign Trade and Tourism |
| **MINJUS** | Ministry of Justice and Human Rights |
| **OECD** | Organisation for Economic Co-operation and Development |
| **OEFA** | Environmental Evaluation and Enforcement Agency |
| **OSINERGMIN** | Supervisory Agency for Investment in Energy and Mining |
| **OSIPTEL** | Supervisory Agency for Private Investment in Telecommunications |
| **OSITRAN** | Supervisory Agency for Public Transportation Infrastructure |
| **PeruPetro** | Peruvian National Oil Company |
| **PCM** | Incentives Programme for the Improvement of the Municipalities' Management |
| **PIM** | Municipal Administration Improvement Incentive Program |
| **PM** | Production Minister |
| **PNMGP** | National Modernisation Policy of Public Management |
| **PNSA** | National Plan of Administrative Simplification |
| **RIA** | Regulatory Impact Assessment |
| **ROF12** | Bylaw of Organization and Faculties of the Municipal Province of Trujillo |
| **SBS** | Superintendence of Banking, Insurance and Private Pension Fund Administrators |
| **SCM** | Standard Cost Model |
| **SGP** | Secretariat of Public Management |
| **SPIJ** | Peruvian System of Legal Information |
| **SPO** | Specialized Public Organisms |
| **SUNAFIL** | Supervisory Agency for Labour Oversight |
| **SUNASS** | National Superintendence of Sanitation Services |

| | |
|---|---|
| **SUT** | Unique System of Formalities |
| **SUTRAN** | Supervisory Agency for Persons, Cargo and Goods Road Transport |
| **TUPA** | Single Text of Administrative Procedures |
| **UNDP** | United Nations Development Plan |
| **USD** | United States Dollars |
| **VUCE** | Single Window for Foreign Trade |

# *Executive summary*

Peru's macroeconomic performance over the last decade has been outstanding. Significant improvements in economic growth, well-being and poverty reduction have been observed since the introduction of reforms in the 1990s. However, to continue on this path, Peru needs a clear regulatory policy.

## Key findings

- Peru lacks a specific whole-of-government regulatory policy, despite having many elements in place that could form part of such a policy. Programmes and strategies for regulatory policy are scattered across ministries and agencies, or across offices within a given ministry. Moreover, these arrangements lack oversight.
- Although some of the building blocks are in place, Peru lacks a full-fledged system for evaluating draft regulation and regulations that are subject to modifications, to assess whether they provide a net positive benefit to society, and whether they are coherent with other government policies.
- The Vice-ministerial Coordinating Council (CCV) assesses the quality of draft regulations or its modifications, but only regulations that involve multiple sectors.
- Inventories of laws, regulations and formalities are difficult to access, and there is no single registry including all of them; this creates uncertainty for citizens and businesses as to the legal obligations required of them.
- Although a strategy for administrative simplification is in place, there is no baseline for measuring administrative burdens, which can make it difficult to target resources and communicate results.
- There is no general policy on regulatory compliance and enforcement across government agencies, nor are there always manuals or guidelines for conducting inspections.
- Peru has not developed a regulatory policy for subnational governments, and as a result there is limited co-ordination between central and subnational government on achieving a coherent national regulatory framework and promoting good regulatory practices and tools.
- Economic regulators in Peru have a large degree of independence to exert budget and decision making, and display more developed practices of transparency and accountability than central government organisations. Nevertheless, they still depend on the central government for several administrative and human resources matters, their independent status warrant more profound accountability practices, and they are yet to embrace a systematised process for the assessment of draft regulation.

## Key recommendations

- Establish an oversight body which concentrates most, if not all, of the regulatory policy activities and tools currently spread across several ministries, agencies and offices.
- Issue a policy statement on regulatory policy with clear objectives, and include this statement in a law or other binding legal document. This statement should contain all the specific strategies and tools for effectively managing the entire regulatory governance cycle: from *ex ante* evaluation of draft regulation, including encouraging regulation based on evidence; public consultation and stakeholder engagement; administrative simplification and review of the stock of regulation, including *ex post* evaluation; inspections and enforcement; and forward planning.
- A number of elements should also be considered as part of the adoption of regulatory impact assessment (RIA):
  - All draft regulations and RIAs should be made available for consultation by the public for a minimum of 30 days.
  - Consultation should be systematic at the early stages when policy options are being defined and impact assessment is being developed, and once a draft regulation and a draft RIA have been produced.
  - Public comments should also be made available and regulatory agencies should be held accountable for their treatment.
- Create a central online and free access registry of laws and other regulatory instruments that is complete and up to date.
- Measure the administrative burdens created by formalities and information obligations.
- Grant the Commission for the Elimination of Bureaucratic Barriers more independence, including a scheme for a more independent decision-making process and governing body, so it can discharge its functions more effectively.
- Include the policy on inspections and enforcement of regulations as an integral part of regulatory policy. Develop general guidelines relating to objectives such as ethical behaviour and corruption prevention, organisation and planning of inspections, and transparency.
- When issuing the statement on regulatory policy, include formal measures for co-ordinating with subnational governments to promote a coherent national regulatory framework, such as conferences to exchange practices, help desks, and guiding documents; and actively promote the adoption of regulatory tools such as analysis of draft regulation, public consultation and stakeholder engagement.
- Strengthen the governance of economic regulators by reviewing their legal links with central government to enhance their decision making; by upgrading current policies to make regulators more accountable to the central government, to Congress and to the general public; and by introducing a system of *ex ante* impact assessment.

# *Assessment and recommendations*

## For policies and institutions for regulatory policy in Peru

### *Peru lacks an articulated whole-of-government regulatory policy, despite having many elements that could be part of this policy*

The central Peruvian government has several institutions in place, as well as several public policies, which aim at improving the quality of regulations. For instance, the PCM is in charge of the policy on national modernisation which includes administrative simplification, with several ongoing strategies, such as the establishment of the TUPAs for ministries and agencies of all levels of government. Also, the INDECOPI, via the Commission for the Elimination of Bureaucratic Barriers reviews formalities. The Ministry of Justice has issued a manual of legislative technique which provides ministries and agencies with guidance on how to draft a piece of regulation from a legal quality point of view. Similarly, there is the legal obligation for all ministries and agencies of the central government to perform a cost-benefit analysis for almost all new draft regulation, although no mechanism exist to enforce this obligation. More examples have been found of policies and practices directed at promoting and enhancing the quality of regulation.

However, these efforts are not articulated within a single policy instrument, such as a law or a programme. Neither there are institutions that co-ordinate the different efforts such as a ministry, committee, or dedicated body, which could assess the overall performance, results and benefits of their individual impact. Moreover, the Peruvian government has not issued a specific policy statement recognizing regulatory policy objectives as an element of a broader public governance and competitiveness strategy of the government, which could serve as a guiding axis for all the individual efforts. As a result, the full benefits of an articulated whole-of-government regulatory policy are not being acquired by the Peruvian government.

### *All the efforts and strategies on regulatory policies are scattered across ministries and agencies, or across offices within a given ministry. Moreover, the salient feature of these arrangements is the lack of oversight*

Three ministries concentrate most of the functions and activities that pertain to regulatory policy: The MEF, the PCM, and the MINJUS. In the first two cases, the responsibilities on regulatory quality are spread amongst several offices, which include the INDECOPI, the CCV and the Secretariat of Public Management, for the case of the Presidency of the Council of Ministers; and the DGAECYP, the General Directorate for Investment Policy, amongst others, for the case of the MEF. This mosaic of agencies, offices and responsibilities can deter any effort to define and enforce an articulated whole-of-government regulatory policy.

Additionally, within their own responsibilities, these agencies and offices have, in the best of cases, limited capabilities to enforce the obligations on regulatory policy to the ministries and agencies issuing and applying the regulation, and in other cases, they have

no enforcement capabilities whatsoever. For instance, the obligation of preparing *ex ante* cost-benefit analysis for draft regulation is not supervised, and unless the draft regulation goes through the CCV, which applies only in cases of multi sector regulation, the analysis is not done; and even in the cases in which the draft regulation is discussed within the CCV, no proper assessment of the quality of the *ex ante* cost benefit analysis is performed.

The weak oversight of regulatory policy owes its existence to two main reasons: i) inadequate or inexistent legal framework – i.e. no oversight functions have been established; and ii) lack of capacity in terms of human and financial resources. As a result, ministries and other regulating entities have little incentive to comply with their regulatory quality responsibilities.

### *Key recommendations*

- Peru should consider issuing a policy statement on regulatory policy with clear objectives, and considering including this statement as part of a law or another legal document with binding capabilities. This statement should contain all the specific strategies and tools to manage effectively the whole regulatory governance cycle: *ex ante* evaluation of draft regulation including the promotion of regulation based on evidence; consultation and stakeholder engagement; administrative simplification and review of the stock of regulation, including *ex post* evaluation; policy on inspections and enforcement, and forward planning.
- Peru should aspire at establishing an oversight body which concentrates, if not all, most of the regulatory policy activities and tools currently spread across several ministries, agencies and offices. This oversight body should have the legal capability and the necessary resources to carry out an active enforcement of activities, while overseeing the whole regulatory policy, including the capacity to return draft regulation with a proper assessment through the use of Regulatory Impact Assessment (RIA), when the defined criteria is not met.
- As a first step, Peru could consider establishing a co-ordinating council on regulatory policy in which the Ministry of Economics and Finance, the Presidency of the Council of Ministers, and the Ministry of Justice have permanent seats, and with sufficient capabilities to exercise an effective oversight function. Responsibilities and roles for each of these members would have to be defined clearly for the functioning of this council.
- Ideally the policy statement which the first paragraph refers to should include the creation of the oversight body and its functions and responsibilities, and as a transitory strategy, the creation of the co-ordinating council. The practices presented in this report identify approaches to implement accountability, transparency and co-ordination and help identify some lessons that can help guide how these principles are translated into practice.

## For *ex ante* assessment of regulation and public consultation in Peru

***Although some of the building blocks have been set, Peru lacks a full-fledged system for* ex ante *evaluation of draft regulation and of regulations that are subject to modifications, in order to assess whether they provide a net positive benefit to society, and whether they are coherent with other government policies.***

When preparing draft regulations, or draft modifications to existing ones, ministries and agencies have the legal obligation to prepare a cost-benefit analysis as an *ex ante* evaluation, to demonstrate the net benefit of the proposal. Similarly, there are legal obligations to publish the draft regulatory projects before they come into force, although no provisions are established to consider the public´s feedback and modify the drafts if applicable. There is also the Manual on Legislative Technique issued by the MINJUS which provides ministries and agencies with guidance on how to draft a piece of regulation from a legal quality point of view. However, these practices are not always enforced properly, and as a result there is no systematic review of whether regulations are "fit-for-purpose" and provide a net positive benefit to society before they are implemented.

The MINJUS has as one of its objectives to assess the constitutionality and legality of norms that go through the CCV or need approval of the Council of Ministers or the President. When the cost-benefits of draft regulation are prepared, the MEF has so far taken a leading role in evaluating them. This role has more prominence in the case of draft regulations that goes through the CCV, although in other cases of sectoral regulation, the MEF also issues an opinion. Similarly, the Ministry of Economy and Finance regularly assesses policies and draft regulations using comparative analysis and benchmarking of good international practices. This specialisation has led to the generation and accumulation of a critical mass of capacities and expertise which should be exploited when implementing and adopting a full-fledged regulatory policy in Peru.

Across OECD countries, it is commonplace that ministries with the portfolio of finance, economy, or the promotion of business competitiveness concentrate the role of "gate keepers" to ensure quality of new rules. In fact, in 13 OECD countries, the oversight of the process of *ex ante* assessment of draft regulation falls on ministries of finance, ministries of economy or treasuries (OECD, 2015a). This institutional setting may reflect the need to have a ministry that can exert "soft power" to ensure the compliance of regulatory policy by other government agencies.

### *The Vice-ministerial Coordinating Council (CCV) is a mechanism to assess the quality of draft regulations or its modifications, but only multi sector regulation goes through this process*

In practice, the treatment of multi sector regulations differs greatly from regulations which involve only one sector. Multi-sector regulation goes through a more rigorous process of *ex ante* evaluation. In principle, all sorts of draft regulation should have a proper *ex ante* assessment of impact. The drafting process for new regulations that involve only one sector is carried out exclusively by the regulatory agency sponsoring the regulation and, most of the times, is not overseen at any stage of the process by any other institution; as a result it is not clear whether those regulations actually comply with legislative drafting guidelines issued by the MINJUS, with the cost-benefit analysis that some of the regulations must include, or the general pre-publication obligations. As a consequence, this type of regulations can be issued without considering the input of stakeholders, and without an assessment of the potential impacts they could impose on society.

Multi sector draft regulations on the other hand have to be discussed before their adoption and implementation by the Vice-ministerial Coordinating Council (CCV), which plays to some extent a role of an oversight body – without having a mandate in this sense – as any of its members (thirty fie vice-ministers) is allowed to raise substance or quality

issues. Thus, the CCV plays an important role in promoting policy coherence across policy portfolios and consistency with overarching public policy objectives. Nevertheless, the fact that proposed draft regulation will not be adopted until all issues have been cleared provides a de facto veto role to each of the vice-ministries participating in the CCV. As a result, there is the risk that the CCV may create bottlenecks in the policy process, or bargaining strategies with negative trade-offs amongst vice-ministries may appear.

### *Key recommendations*

- Peru should introduce a system of *ex ante* impact assessment, i.e. a Regulatory Impact Assessment, for draft regulations and regulations that are subject to modification, as part of its administrative processes. The RIA system would require all regulators to prepare a RIA in order to help them in the development of new regulations. Threshold criteria could be employed to define the depth of the assessment efforts in regulations with the largest impact.
- The oversight body suggested before should have a clear mandate to oversee the process of development of new regulations, and in particular to supervise the quality of both RIAs and draft regulations. As a first step and until this oversight body is created, and taking advantage of its capacities and specialisation, the MEF should be given the authority within the Coordinating Council on Regulatory Policy to review all RIAs, including the capacity to ask regulators for their improvement. This would involve giving MEF the required human and technical resources, as well as the legal attributions, to perform this task, and implement a pilot program as a training mechanism for both MEF and regulatory agencies. RIA manuals and technical guidelines (for instance for developing the cost-benefit analysis) should also be developed by MEF.
- As part of this oversight function by the Coordinating Council on Regulatory Policy, the MINJUS should be given the mandate to assess the constitutionality and legality of the draft regulation, enforce the application of the legislative drafting guidelines and overseeing the legal quality of all draft regulations. On the other hand, the PCM through the Secretariat of Public Administration should be given within the Coordinating Council on Regulatory Policy the mandate to oversee that all draft regulations reflect co-ordination and coherence with public policies at the national level, that they follow the guidelines on administrative simplification, and that they abide to principles on the structure and functioning of the government.
- A number of elements should also be considered as part of the adoption of RIA:
  - All draft regulations and RIAs should be made available for consultation by the public at large for a minimum of 30 days.
  - Consultation should be systematic at the early stages when policy options are being defined and impact assessment is being developed, and once a draft regulation and a draft RIA have been produced.
  - Public comments should also be made available and regulatory agencies should be held accountable for their treatment.
  - A system of forward planning should be created in order to make the development of new regulations more transparent and predictable.

- As part of the RIA process, evidence on the problem that is faced, objectives and options should be properly addressed, while evaluating all relevant impacts, including those on competition, trade, and SMEs.
- Promotion of the use of risk-based approaches to regulations and compliance. Peru should also consider issuing guidelines in order to establish clear boundaries as to the extent of comments from attending officials to the CCV, who should constrain their comments according the legal competences of the office they represent. Alternative forms of governance arrangements should be considered for the CCV, in order to avoid the power of veto that each member of the CCV currently has.

- Once the Coordinating Council on Regulatory Policy or the oversight body are introduced, and a RIA system is introduced even in pilot phase, the RIA should be part of the assessment from the CCV. The analysis that has to be carried out by the MEF, the PCM and the MINJUS should be done before the draft regulation goes to the CCV, with adequate period to carry out the analysis. The opinion issued by the Coordinating Council on Regulatory Policy or the oversight body on the draft regulation and the RIA should be considered as part of the assessment of the CCV.

## For the management of the stock of regulation and administrative simplification policies in Peru

### *Inventories of laws, regulations and formalities are of difficult access, and there is not a single concentrated registry of them, which can create uncertainty to citizens and businesses as to the legal obligations required of them*

Citizens can find on the website of the Peruvian congress an updated list of primary laws in force. However, in the case of other legal instruments, such as supreme decrees – which are issued by the executive power – as well as other subordinate regulations, there is a repository but it is not of free access. The MINJUS has the website Peruvian System of Legal Information, which offers a basic service of free access with a compilation of the most relevant legal instruments, but access to the complete database requires payment of a fee.

The ministries and agencies of all levels of governments – central, regional and local – have the obligation to supply standardised information in printed form and on their websites of the formalities required by law for business and citizens. The Single Texts of Administrative Procedures (TUPAs) are often found in ministries' websites, and most of the times in hard copies in government offices which offer front line services. However, so far a single registry of TUPAs has not been developed yet, although a Legislative Decree ordering the construction of the Unique System of Formalities (SUT) has recently been issued and it is under implementation.

Moreover, the Secretariat of Public Management, part of the PCM, has acknowledged that it lacks the financial and human resources to perform an effective oversight of the TUPAs and oblige ministries to follow the guidelines set for their development and publication. As a result, the quality and type of the information of the TUPAs across ministries and agencies varies.

The lack of a single registry with information of quality for laws and regulatory instruments can be a source of uncertainty for businesses and citizens alike. This uncertainty can be exploited by public officials to their advantage, in detriment to entrepreneurial and business activity, and can affect negatively the experience and perception of citizens in the use of front line government services.

***Although a strategy for administrative simplification is in place, there is not an effective oversight of its implementation. These efforts are further diminished because the Peruvian government lacks a baseline of administrative burdens emanating from formalities and information obligations for business and citizens, which can make difficult to target resources and communicate results. Additionally, strategies for digitalisation of formalities and e-government services are still incipient and at early stages of development.***

The Secretariat of Public Management has issued a methodology on administrative simplification and procedures for the National Government, Regional Governments and Local Governments, which offers instructions to ministries and agencies of the three levels of government to eliminate information requirement, reduce response times, and other strategies aimed at reducing burdens from formalities and information obligations for citizens and businesses. This has been coupled with the release of a national strategy on modernisation of the public administration, a national plan on administrative simplification, and an implementation strategy. However the implementation strategies, and the evaluation of results and impacts of simplification, have not been enforced. The Secretariat of Public Management does not seem to have the financial and human resources to carry out these activities, and also lacks the regulatory framework to carry out an effective oversight function. The need to address these shortcomings becomes more pressing in the face of the publication of the legislative decree that creates that SUT.

Additionally, no measurement of administrative burdens for business and citizens coming from formalities has been carried out, so a baseline measurement is not available. This limits the capacity of the Peruvian government to target scarce public resources on the most burdensome formalities, and on its ability to assess the benefits of alternative strategies that can be as effective at reducing burdens, such as applying citizen language, increasing the quality of template and submission forms, as well as digitalisation and other e-government strategies. It also reduces the capacity of the government to communicate more effectively the results of the simplification strategies, which can ensure continuous support for this type of initiatives and contribute to eliminate the resistance of ministries and agencies.

Finally, an agenda to make available on line formalities or public services for citizens as part of an e-government strategy has not been implemented.

***The contribution of the Commission for the Elimination of Bureaucratic Barriers to reduce administrative burdens from formalities and provide legal certainty can be enhanced***

The Commission for the Elimination of Bureaucratic Barriers, part of INDECOPI, has the legal capacity to assess the regulatory framework of Peru, which includes the mandate to attend the public´s complaints on formalities and information obligations that go beyond the legal framework, or which are not "justified". In case the complaint is valid, the Commission can request the ministry or agency sponsoring the formality to stop

requiring specific information or stop demanding the formality altogether. After an administrative and legal procedure, this request can become legally binding. The commission can also start investigations of the same nature on its own. The Commission can perform these tasks for formalities required by the three levels of government.

However, these capacities are bound by the fact that the Commission does not have legal mandate to carry out a systematised evaluation of formalities or a baseline measurement to develop a specific strategy for burden reduction, as part of a larger policy on administrative simplification and *ex post* analysis of the regulation, nor does seem to have the resources to carry such a programme. The baseline could include first a definition of which rules can be considered a bureaucratic barrier first, and then an assessment of their legality, rationality and proportionality.

Additionally, the commission's capacity for evaluation and of "pointing fingers" can be restrained by the fact that it is an office within an agency (INDECOPI) in which the independence of its decisions can be undermined by political objectives.

### *No evidence was found that Peru carries out ex post evaluation of laws or regulations in force*

From a regulatory governance perspective, in which regulations follow a ¨life-cycle" approach which includes the stages of *ex ante* assessment and compliance and enforcement, the *ex post* evaluation of whether regulations in force effectively and efficiently address the policy problem represent a building block for an effective regulatory policy. It is only after implementation that the effects and impacts of regulations can be fully assessed, including direct and indirect incidence and unintended consequences.

During the interviews and after reviewing the supporting documents provided by Peruvian officials, no evidence was found that Peru carries out *ex post* evaluations of laws or regulations in force. The only exception identified was the investigations carried out by the Commission for the Elimination of Bureaucratic Barriers, but they focus only on assessing the legal validity or "reasonable justification" of existing formalities or of data requirements demands as part of formalities, rather than evaluating whole pieces of legislation, regulatory instruments, or regulation affecting specific economic sectors.

## *Key recommendations*

- Create a central online and free access registry of laws, and other regulatory instruments, which is complete and up to date. Establish a similar central and online registry of TUPAs in which the quality and amount of information is ensured and up to date. The recent publication of the Legislative Decree which creates the Single System of Formalities (SUT) goes in this direction and should be implemented fully. Ministries and agencies of the three levels of government should be obliged to feed the system with the supervision of the oversight body to keep the registries up to date, including the addition of new formalities, as a result of new regulations. The new formalities and regulation should go through the RIA process, in which administrative simplification criteria have to be applied to the new formalities.
- Ensure the full implementation of the policies of administrative simplification, which should include evaluation of the impacts. Appropriate resources to carry out these tasks should be contemplated. In the framework of the Coordinating

Council on Regulatory Policy, the implementation of these policies should be followed up, assessed and improved.

- Carry out a measurement of administrative burdens of formalities and information obligations. As an alternative to a full baseline, the formalities for the most relevant economic process or the formalities for priority sectors can be measured first, and a strategy in stages can be developed further on. Based on these results, the efforts on administrative simplification can be targeted and focused in order to ensure the achievement of defined goals.
- Consider granting the Commission for the Elimination of Bureaucratic Barriers more independence, including a scheme for a more independent decision making process and governing body, so it can discharge its functions more effectively. This should be coupled with the establishment of proper arrangements for accountability and transparency.
- The resolutions of the Commission of Bureaucratic Barriers should be investigated further by the Coordinating Council on Regulatory Policy, in order to assess whether this council should take further action to promote the modification or elimination of the source regulation that created the citizen complaint in the first place.
- As part of Peru´s regulatory policy, consider establishing a programme on *ex post* evaluation of regulation. The program should define specific criteria for the selection of laws or regulation to asses, the periodicity of evaluation, guidelines of evaluation, and should set the necessary provisions for the Coordinating Council on Regulatory Policy to promote modifications on the regulatory framework as part of this assessment.

## For compliance and enforcement of regulation in Peru

### *There is no general policy on regulatory compliance and enforcement across government agencies. Moreover inspections are not seen as an essential part of regulatory policy*

There is an important distinction on the approach taken by line ministries and independent agencies with regard to inspections—which is a key component to improve compliance and enforcement. Line ministries consider not only inspections as sector specific, but it is common that inside a Ministry, different administrative units in charge of inspections coexist without any co-ordination, exchange of information or experiences among them.

There is little evidence that regulatory institutions conduct inspections based on risk assessment. In general, inspection activity has to be differentiated between economic and social regulators and ministry agencies. For instance, there are regulators which inspect all regulated entities and others inspect a sample of them.

A notion in which inspections are regarded as a key tool to achieve policy and regulatory outcomes has not been developed across ministries and agencies. Very often compliance and enforcement are just seen as part of the day-to-day work, despite the fact that they represent a key element in regulatory policy to attain higher policy objectives. This in turn can be reflected in a narrow vision that gives precedence to outputs over policy outcomes.

***Step-by-step manuals and guidelines to conduct inspections to achieve policy objectives with transparency and integrity is not a standard practice in Peruvian institutions***

Each institution conducts inspections according to its own regulatory framework, but in several cases inspections processes are not further developed in written guidelines. Additionally, no evidence was found that in these framework and guidelines, a prominent place is given to establish the inspection practices as a tool designed to prevent corruption, regulatory capture and promote transparency.

***The governance arrangements on inspections between central and local government can hamper the effectiveness of inspection to reach policy objectives***

The central government has delegated responsibilities and surveillance functions to subnational governments which can affect the inspection process, the capacity to inspect and the expected policy results from this task.

For instance, workplace inspection's responsibilities have split horizontally between central and subnational governments in some sectors. Workplace inspections for medium and large enterprises are responsibility of central government, leaving to subnational governments the responsibility to inspect smaller business (less than 10 employees).

Considering that institutional capacity and adequate personnel for inspections are weaker at subnational level, and that the quantity of business in the small and micro category is much larger, the risk of having an ineffective inspection policy for the workplace is much larger for subnational governments. The situation can be aggravated when considering that small business are more prone to not complying with regulation given their larger likelihood to be part of the informal sector.

## *Key recommendations*

- Peru should include the policy of inspections and enforcement of regulations as an integral part of its regulatory policy. The Peruvian government should include and emphasise the importance of compliance and enforcement as part of its broader policy statement to achieve its general objectives of sector regulation.
- This would include addressing the governance of inspection authorities through a cross-cutting policy. This would imply reducing the fragmentation of inspection authorities, improving co-ordination and communication, sharing of information and best practices (including at different levels of government), and reforming the administrative units in charge of inspections within line ministries in order to provide them with more independence from other regulating areas.
- The cross-cutting policy mentioned before should include general guidelines relating to horizontal objectives such as ethical behaviour and corruption prevention, organisation and planning of inspections, and transparency towards the subjects of inspections. It should also include guidelines to implement a risk based approach for inspections, information integration and sharing, and widespread use of third parties to carry out inspections.
- In order to ensure the effectiveness and efficiency of regulatory enforcement and inspections adequate human, technological and financial resources should also be available to agencies.

## For multi-level regulatory governance in Peru

***Peru has not developed a regulatory policy for subnational governments, and as a result there is limited co-ordination between central and subnational government to achieve a coherent national regulatory framework, and to promote good regulatory practices and tools***

Because Peru is a unitary country, at the central level it has the capability to issue laws and other legal instruments, which are mandatory for all levels of government. However, subnational governments still have significant regulatory powers. They can issue their own regulatory instruments, called "*ordenanzas*", and must implement several national laws by issuing further secondary regulation. Therefore co-ordination across levels of government is needed for an effective regulatory policy. The central has created mechanism to seek co-ordination with subnational governments on matter of public policy, but not specialised on regulatory policy. Additionally, it offers fiscal incentives and money transfers to subnational governments to encourage the application of administrative simplification policies. The tasks performed by the Commission for the Elimination of Bureaucratic Barriers in reviewing formalities at all levels of government also contributes to improve the quality of regulation at regional and local level in Peru.

Despite these efforts, there is not a co-ordinated regulatory policy across levels of government in Peru, which can lead to the existence of duplications and loopholes in the regulatory framework. From the information collected from the cases of the municipalities of Arequipa and Trujillo, it was found that there is not an office or contact point to which subnational government can resort to when it comes to settle doubts or request guidance on how to issue regulation to implement central laws or other legal instruments. At the central level, line ministries and other regulatory agencies also complain that subnational governments exceed their regulatory powers by issuing regulation that either overlaps with the national framework, or establish contradictory terms.

***With the exception of the policy on administrative simplification, the practices that are applied at the central level, even at their current stage of intermittent application are not promoted by the central government to subnational governments. This includes ex ante analysis of regulation, promotion of legal quality, and pre-publication. As a result they have not been adopted at the regional and local level***

The fiscal incentives and money transfers to subnational governments to encourage the application of administrative simplification policies, and the tasks performed by the Commission for the Elimination of Bureaucratic Barriers in reviewing formalities at subnational level, contribute to reduce the burdens for citizens and businesses from formalities at regional and local level. As in the case of the central government, subnational governments are obliged to follow the preparation and publication of the TUPAs) and apply all the strategies and programmes on administrative simplification issued by the PCM. However, the challenge for the PCM to effectively supervise these policies at subnational level remains.

However, for the case of the other regulatory tools applied at central level, which include the preparation of a cost-benefit analysis for draft regulation, the obligation to publish the draft regulation, and the obligation to follow the Guide on Legislative Technique are not actively promoted by the central government to be adopted by

subnational ones. From the information collected from the cases of the municipalities of Arequipa and Trujillo, it was found that they do not follow these practices, or they did not know about the available guidelines to improve the quality of their regulation.

### *Key recommendations*

- When issuing the statement on regulatory policy, Peru should include formal measures to establish co-ordination with subnational governments to promote a coherent national regulatory framework, and promote actively the adoption of regulatory tools, such as *ex ante* analysis of draft regulation, consultation and stakeholder engagement, amongst others. Formal venues for the co-ordination, such as conferences or help desks, should be considered. Guidelines and compendiums of good practices should also be enhanced and promoted across subnational governments.
- As part of this policy, a more active strategy on fiscal incentives and money transfers could be established, which could cover regional governments as well, not only municipalities, to incentivise the adoption of all tools. As a complementary measure, a policy of evaluation and assessment in the progress of the adoption of these tools by subnational governments could also be pursued, as a way to create league tables and further promote the implementation of the tools.
- The policy should also include the delivery of capacity building training to regional and local officials to aid the implementation of regulatory policy at subnational level.

## For the governance of regulators in Peru

***Economic regulators in Peru have a large degree of independence to exert budget and decision making. Nevertheless, as decentralised bodies, they still have links to the executive power***

According to the own regulators and public agencies such as the Presidency of the Council of Ministries and the Ministry of Economy and Finance, Regulators enjoy full decision making independence and they fund their operation through the regulated businesses. Depending of the approval of PCM, regulators can collect a maximum of 1% of income from regulated entities after sales taxes—in fact this is the unique funding resource for regulators. This scheme represents a strength that contributes to the independence of the regulators.

Regulators still have formal dependence from the Presidency of the Council of Ministers. For instance, similar to the entities of the central administration, any reorganisation or institutional change needs to be approved by the Ministers' Council, as well as their regulation of organisation and functions. It is not clear whether these links affect the capacity of regulators to discharge their function on an independent and effective way.

***Regulator's practices on transparency and accountability are more advanced compared to the central government. However, as long as regulators exert independence, these practices should be enhanced***

Regulators, as decentralised institutions of the central government, must follow transparency obligations set by the legal framework for the Peruvian government. These obligations, however, should be enhanced whenever institutions have an independence status. This will contribute to avoiding regulatory capture and boost confidence and trust from the public, central government and regulated entities.

A similar situation applies in the case of accountability obligations for economic regulators. Currently, these regulators are accountable to the MEF in matters of budget execution, and to the PCM on strategic plans, performance indicators, amongst others. These obligations, however, should be extended to other institutions such as Congress and others stakeholders, for instance the *Council of Users*. Regulators have no obligation to submit annual performance reports to Congress, or to stand before Congress to present a report. Regulators indicate that they send report to Congress or other public institutions whenever it is required. Nevertheless, accountability practices should be systematised.

***Economic regulators regularly publish draft regulation and collect comments from the public, but there are available opportunities to improve stakeholder engagement practices. There is also publicity of meetings with regulated entities in the regulators' websites, but actions to avoid regulatory capture could be boosted***

Although some of the regulators publish the draft regulation and allow stakeholders to provide comments, further steps can be taken to ensure a systematised practice. For example; OSIPTEL in the case of draft regulations related for fixing tariffs or interconnection charges notifies mainly the parties which it considers will be affected, and OSINERGMIN decides to conduct consultation depending on the complexity of the draft regulation. Best OECD practices suggest that consultation should be carried out for all types of regulation and whenever exceptions arise, proper justification should be provided, accompanied with an *ex post* assessment once the regulation has been enacted.

Economic Regulators in Peru have a variety of forms to engage with stakeholders, but practices differ across the type of stakeholders. For instance, there is an established *Council of Users* which is consulted regularly, but for other stakeholders consultations are on demand and in an isolated manner. To avoid opportunities for regulatory capture, consultations practices have to be formalised and systematised.

With the inputs from consultation, regulators prepare a matrix of comments, and make it public. The information provided by users can be exploited further to increase the quality of regulation. They can help to define the problem that needs to be addressed more precisely, suggest alternatives to regulations, and uncover potential costs of the regulation not considered before.

***The funding scheme of the water regulator could be enhanced further***

For the case of the water regulator SUNASS, the current arrangement of receiving income from the regulated entities is not enough to discharge its functions. SUNASS' supervised entities are small public agencies with low business income. In fact, SUNASS has indicated that the annual budget is not adequate to conduct inspections properly.

***There is room to improve the tools used by the economic regulators to assess the degree to which they are accomplishing their policy objectives. Indicators are essential to determine whether policies are moving in the right direction***

Economic regulators report several indicators focusing on quality of the services, effectiveness in budget execution, efficiency and results of programmes, amongst others. Impact indicators, however, which should focus on how the activities of the regulators achieve the general and specific policy objectives, have not been developed.

These indicators should be an important element of the *Strategic Plan* of the regulators. Currently, this plan includes the regulator´s policy objectives, and provisions to measure progress in achieving these goals should also be added. It is important to distinguish in the *Strategic Plan* how different types of indicators contribute to the objectives: from strategic indicators measuring general objectives, to detailed indicators measuring progress in specific activities.

***The quality of the cost-benefit analysis that regulators prepare as part of the ex ante analysis of draft regulation could be improved***

In general, the evidence suggests that regulators prepare cost-benefit analysis of draft regulation as part of *ex ante* assessment with more regularity and with better quality than other public agencies of the central Peruvian government. Nevertheless, the analysis and the use of standard criteria to prepare the assessment could be improved. In general, regulators do not follow guidelines when preparing cost-benefit analysis.

## *Key recommendations*

Peru should consider strengthening the governance of economic regulators by:

- Review the funding scheme of SUNASS so as to ensure the necessary funding that allows it to discharge its functions and reach its policy objectives effectively, while maintaining its independence.
- Reviewing the legal links of economic regulators with central government in order to enhance decision making by regulators. This should include, but not be limited to, administrative decisions and tasks, such as internal organisation.
- Upgrading current policies to make regulators more accountable to the central government, to Congress and to the general public. This should include periodic performance reports, as well as the publication of operational policies. To this aim, relevant indicators should be developed to help assess the achievement policy results from the regulatory interventions.
- Carrying out on a regular basis formal engagement processes with stakeholders. This should include guidelines and procedures for consultation on draft regulation and other forms of engagement with regulated entities. Rules on transparency for the treatment of comments by the public should be set.
- Introducing a system of *ex ante* impact assessment, i.e. a Regulatory Impact Assessment, for draft regulations and regulations that are subject to modifications, which should be independent from the RIA system of the central government of Peru. Measures should be taken to target resources and apply a deeper analysis to regulations with the most significant impact. As part of the consultation process of draft regulations, RIAs should be also made available to the public. RIA manuals and guidelines should be issued, and capacity building training for public officials should be provided. Regulators should establish their own provisions to ensure and asses the quality of their own RIAs, which should be independent from the oversight on RIA for the central government of Peru, to be carried out by the co-ordinating council on regulatory policy recommended in this report.

# *Chapter 1*

# Structural reforms and the recent macroeconomic context in Peru

*Peru suffered from hyperinflation and a deep economic crisis during the 1980s. A first wave of structural reforms took place in the early 1990s. Private investment, including foreign investment, was promoted. New measures to open the country to foreign trade were introduced. And measures to ensure fair market competition were enacted. However, by the second half of the nineties, reform actions decelerated sharply. Notwithstanding, Peru's macroeconomic performance over the last decade has been the best in over a century. This performance is in part the result of a very favourable external environment, but is also a consequence of a successful combination of sound fiscal policy based on a fiscal responsibility law and monetary credibility. Significant improvements in economic growth, well-being and poverty reduction have been observed since the introduction of reforms in the 1990s, but more reforms are needed to achieve a more inclusive and sustainable path.*

## Overview of recent structural reforms in Peru

This section provides an overview of the main structural reforms that took place in Peru during the 1990s, which laid the foundation for the high recent economic performance of the country. It is based on expert papers, on the OECD Report *Multidimensional Review of Peru* (OECD 2015), and on information collected by OECD through interviews to public officials to prepare the current report, along with supporting documentation.

The description of events and reforms in this section does not necessarily follow a strict chronological order. Rather, the intention is to present a coherent and logical description of actions and progress, keeping a broad consistency with the timeline.

### *Peru suffered from hyperinflation and a deep economic crisis during the 1980s*

After a decade of state control by the military during the 1970s, democracy in Peru was reinstated in 1980. Despite the appearance of democracy and some incipient reforms efforts of market liberalisation, foreign trade and promotion of investment, the state model of a heavy regulated economy, in which the state had the control of the economic activity, was not fundamentally changed. The government's influence was exerted through state monopolies, restriction for private investment, price controls, and heavy and numerous bureaucratic barriers (Martinez-Ortiz, 2015).

In order to re activate the economy, the government in the second half of the eighties in agreement with a group of private sector leaders (called "the 12 apostles") tried to expand the public expenditure by allowing for some inflation. Also, more market restrictive measures on internal and external commerce and on investment were introduced. These rigidities led to a fall on production and the emergence of black markets. The monetary supply grew at a higher rate than production and aggregate demand in order to finance the growth on public expenditure. This model was not sustainable due to large public budget deficit, public debt crisis, and inefficiency by the government. Additionally, Peru suffered the effects of social unrest.[1] These problems materialised in hyperinflation, poverty and lack of security. At the end of the presidential term of 1985-1990, the aggregated inflation was of 2.2 million per cent, the GDP per capita fell to USD 720 (amount comparable to 1960), there were billionaire widespread losses in state-owned companies, an poverty increased sharply (Martinez-Ortiz, 2015).

### *A first wave of structural reforms took place in the early 1990s*

In order to face economic crisis, the government elected at the start of the 1990s implemented a stabilisation program with strong measures to reduce inflation. This program included drastic reduction of subsidies, budgetary discipline, and restrictive monetary policy. This was followed by actions to reform the State and change the functions, roles and activities inherited from the seventies and eighties. The idea was to give more room to market and private forces in the economy. The government had the objective to reverse predominant public policies in Peru, during two decades.

In this perspective, the economy was liberalised and deregulated, and a model more oriented to market forces was pursued. Reforms were undertaken to establish new regulatory entities, open the country to foreign investment, and international trade. Reforms to the Central Bank were introduced to ensure its autonomy, exchange rate controls were terminated, capital markets restrictions were eliminated, many state companies were privatised, state monopolies terminated, tax and customs systems were

simplified, and the State moved out from banking and financial sector. As a result, a more market friendly economy was established, private investment started to grow and the country rapidly recovered macroeconomic stability.

The main vehicle for these reforms was legislative decrees (*Decretos Legislativos*).[2] In 1991, Congress enacted Act No. 25327. This Act gave power (delegate) to the President to approve and enact legislation through Legislative Decrees in three areas: national pacification, employment promotion and private investment growth.

Through these Acts, the government initiated a clear change in state functions, activities and roles and in the economy. The economy was opened and liberalised and market forces freed. The message was clear: the State withdrew from performing economic activities and participating in the market. The government eliminated monopolies, controls and restrictions on markets. The government would focus in regulation (when necessary) and in the provision of public services (directly or through private sector).

### *Private investment, including foreign investment, was promoted*

Reforms included the recognition of private investment, liberty of enterprise and private property, in order to create a more oriented market economy, in which competition was set as a principle. Rights, warrants and obligations applicable to all natural persons and legal entities, national or foreign making investments in Peru were established, along with provisions for the equal treatment of national and foreign investors, subject to the same rights and obligations.[3]

Any advantage or preferred treatment to State companies was banned. In this setting, prices were not regulated by the State and were the result of interaction between supply and demand forces. Only prices of public services (defined by law) would be subject to price regulation.[4]

Private property was guaranteed. Expropriation when considered necessary for strict reasons of national security or public utility required a specific Act enacted by Congress. In this case, proper compensation by the State was necessary.[5]

Reforms were also introduced to eliminate the authorisation of foreign investment and open the economy to this investment without any restriction to sector. Therefore, there were no protected monopolies or reserved areas for the State or for Peruvian nationals.[6]

Foreign investor could transfer foreign currency, coming from investment, income, profit or royalties obtained in Peru without any previous limitation or authorisation. The only obligation – common in all the world – was paying national taxes. Foreign investors also had the right to buy or acquire shares or participations in companies in Peru. They had the right to buy or acquire any kind of property as well. Finally, the liberties of commerce were recognised as well as the liberty to export and import by foreign investors.[7]

In order to attract foreign investment, legal stability agreements (*convenios de estabilidad jurídica*), could be signed between foreign investors and the government. Through these agreements, the government could freeze the tax regime, the regime of foreign currency transfer, labour regulation regime and other special regime applicable. The conflicts related to his agreements could be solved through arbitration.[8]

Reforms also included specific provisions to allow for and promote investment in sector specific areas of the economy, such as the mining sector, maritime and air transport, electricity, and telecommunications, amongst others.

In the mining sector, tax benefits and deductions were introduced, rights of equal treatment were strengthened, and simplification of authorisations and permits was applied.[9] Maritime and air transport markets were opened and liberalised, finishing the period of heavy regulation. Shipping, maritime and air transport activities were opened to national and foreign investment. Permits and authorisations in these sectors were drastically simplified.[10]

The legal framework for activities in the electricity sector (generation, transmission and distribution) derived from thermic, hydric or geothermic sources was established. Similarly to other sectors, this market was opened and liberalised to national and foreign investment. A new public entity, the Electricity Price Commission (CT, *Comisión de Tarifas Eléctricas,* later on merged with the Supervisory Agency for Investment in Energy and Mining, OSINERGMIN) was created.[11] This entity exemplified the new role of the State. Electricity was a public service provided by private companies, subject to economic regulation to prevent abuse of market power.

Similarly, in the Telecommunication area, the legal framework to carry out activities in this sector was introduced. This market was opened and liberalised. All the operations in this market were opened to national and foreign investment. The Supervisory Agency for Private Investment in Telecommunications (OSIPTEL)[12] was created to regulate tariffs and behaviour of private companies in telecommunication.[13]

Financial markets in Peru were also opened and liberalised, thus ending a period of heavy regulation. Equal legal treatment to national and foreign investment in financial activities was set, as well as openness to any of the financial market activities, freedom of contract, and freedom to establish of interest rates. The government confined its role to regulation, oversight and supervision of this market: the Superintendence of Banking, Insurance and Private Pension Fund Administrators (SBS) was reformed and modernised. This public institution was granted a high level of autonomy and powers to accomplish its mission. The Superintendence had to regulate, authorise, oversee, supervise the companies in the financial market and had power to enforce the regulations; including the capability to intervene and dissolve financial institutions and impose sanctions on them.[14]

### *New measures to open the country to foreign trade were introduced*

Freedom of international and foreign trade as well as internal commerce was introduced. Liberty to possess foreign currency and liberty to exchange that currency were recognised. The following rules were also set:[15]

- Further reduction of tariffs to importation.
- Elimination of non-tariffs and barriers to importation (registries, permits, authorisations, restrictions and prohibitions).
- Elimination of any kind of exonerations or special treatments in tariffs and taxes applicable to importation.
- Elimination to all kinds of subsidies to exportation.

### *The economic intervention of the state in markets and in the economy was reduced and restricted, and measures to support the government's activities with private investment were set*

Reforms included the transfer of State property and companies to the private sector. Different forms to make effective the transfer to private sector were defined: i) transfer of assets ii) transfer of shares, iii) increase of equity, iv) management, lease or joint venture contracts, and v) liquidation of assets.[16] The purpose was to increase asset profitability utility, generate income for the State, reduce the public budget deficit, provide more and/or better goods and services to the population, diversify the economy, increase competition in the market and promote productive potential through investment and know-how.

To implement the privatisation process, the Private Investment Promotion Commission (COPRI, *Comisión de Promoción de la Inversión Privada*) was created. This was a board integrated by ministers (the highest level public officials in the executive branch in Peru). COPRI had powers to: i) determine the State companies to be privatised, ii) the form of privatisation, iii) the policies to follow during the process, and iv) the members to conform the Special Privatisation Committee.[17]

The COPRIs had to analyse the situation of the company, describe the steps in the privatisation process, and estimate the projected earnings. The COPPRI had to propose a base price for the privatisation process. The sale of the assets had to be under open competition. For that purpose the sale was made through the stock exchange or open public bids.[18]

Under this scheme, 180 State companies were privatised from 1991 to 1998. All this privatisation process generates income of USD 7.7 billion coming from the sale of assets, and USD 7.9 billion coming from investment made by private sector in privatised companies (Martinez-Ortiz, 2015).

A system of concessions was also introduced.[19] A concession was a contract whereby private companies received authorisation from the State[20] to build, maintain, managed and/or exploit[21] for a certain period of time (usually long periods) infrastructure and/or public services.[22] In the concession, the state kept ownership of assets and services but transferred control over them.

Concessions were granted through open public bidding. These contracts established the time of the concession, the rights and obligations of parties and particularly, causes of termination, characteristics of the infrastructure to be built, conditions and standards of service, fees the private companies could charge to users and dispute resolution methods.

The government also took efforts to increase the predictability of government actions, hence reducing uncertainty to investors and businesses. For instance, the principle of "tax legality" was introduced. According to this principle, no tax could be established, modified, increased or enforced without proper approval by Congress through an Act.[23]

First efforts on administrative simplification were also introduced through the Single Text of Administrative Procedures (TUPA). The TUPA was mandatory for all the public entities, in which all the necessary information to initiate and successfully complete an administrative procedures and formalities was codified and consolidates for the benefit of all citizens. A policy establishing that administrative procedures should be rationalised, simplified, reduced or eliminated was also initiated. Related to this, it was established that

new administrative procedures could only be created or established by certain type of legislation.[24]

*And measures to ensure fair market competition were enacted*

All these reforms contributed to a withdrawal of the government's activities and influence from performing economic activities and participating in the market. Nevertheless, the elimination of state monopolies, control and restrictions on markets, and the liberalisation of market forces, called also for additional arrangements to promote fair and open competition. Problems could arise derived from market failures, such as private monopolies, anticompetitive actions, and asymmetric information, amongst others.

Hence, new powers were given to the government to challenge any practice limiting or restricting free competition, monopolistic behaviour, and abusive practices of dominant position in the markets.[25] Protection for consumers was also instituted,[26] as well as provisions to regulate commercial publicity related to proper and adequate information.[27] A new public agency was entrusted with the enforcement of these activities: the National Institute for the Defence of Free Competition and Protection of Intellectual Property (INDECOPI, see below)

### *The reforms were consolidated with a new political constitution*

After political turmoil resulting from the impact of the reforms in the early 90's, a new constitution was issued in Peru in 1993 which consolidated and secured to the highest normative levels de reforms started in 1991 (Martinez-Ortiz, 2015).

The 1993 Political Constitution established the country's economy was a "social market economy". In addition, the Political Constitution mentions that the State should guide the country's development and it is "principally active" in promoting employment, health, education, security, public services, and infrastructure. These two expressions ("social market economy" and "principally active") can be interpreted to understand the roles of State in the economy: as a regulator in case of market failures and as a public services provider.

Regarding the market, this Political Constitution recognised the right of private property, liberty of commerce, liberty of industry, freedom of contract and entrepreneurship freedom. According to the Political Constitution, the application of these freedoms must not be harmful to the public moral, health, or safety.

In regulating private property, the Political Constitution established this right should be exercised in harmony with "common good" and within the limits established by the law. Expropriation (taking of property) is possible in case of public security or public utility. In that case, cash payment must be made prior to the expropriation. In addition to that, the Constitution stated that property can be temporarily restricted only on grounds of public security.

National and foreign investments were subject to the same conditions. Freedom in the production of goods and services was installed. The Political Constitution also established freedom in international and foreign trade. But, all foreigners having residency in Peru are subject to the law and jurisdiction of the country.

The Political Constitution also established that private and state owned companies would receive the same legal treatment. The state could only engage in business activities – directly or indirectly – if authorised expressly by Law of the Congress, for reasons of high public interest or evident national convenience.

### *A wave of new, stronger and more independent government institutions were established, that helped to boost the market orientation of the economy, whilst providing oversight to protect the public´s interest*

The institutional and legal reforms undertaken in the nineties changed the economy and the government in Peru. The reforms moved the economy from a closed, protected, and heavily regulated economy to an open market economy. By the same token, the government shifted roles and functions. From the main, if not the only, economic player in many markets, coupled with heavy regulation and controls, the governments shifted to a position of oversight and supervision.

These changes demanded new public entities to make effective the new functions and roles of the government, in order to ensure fair competition and adequate protection to consumers and the public at large. Therefore, in the 1990s, new entities with special powers, proper personnel and adequate budget, within a particular legal framework, were therefore created. These new agencies included the Central Bank (BCR), the SBS, and INDECOPI, along with many others.[28] This new entities were established to enforce the regulatory framework in specific areas of the economy, and were granted varying degree of independence, and technical capacity, with the aim of discharging their functions effectively, and ensure isolation from the political process.

In this sub section, only a brief description of the Central Bank, the SBS and INDECOPI are included, as examples of the new institutional arrangement introduced in Peru in the 1990s.

#### *The Central Bank*

The Central Bank's prime objective is to preserve monetary stability. It has the following functions: i) regulate the money supply, ii) manage international reserves iii) issue money, and iv) report on the public finances. Considering the hyperinflation process Peru suffered in the eighties, the Central Bank was granted the highest possible level of autonomy.

This agency is an "Autonomous Constitutional Organism" under the Political Constitution, regulated complementarily by an Organic Act (a special Act passed by Congress). This institutional arrangement shields the Central Bank from undue influence from the legislative or executive branch.

The highest authority in the Central Bank is the Board of Directors. The Board is integrated by seven members. The executive and the legislative branches each appoint three members to the Board. The Chairman is designated by the executive and ratified by the Permanent Commission of Congress.

*Superintendence of Banking, Insurance and Private Pension Fund Administrators (SBS)*

The SBS has to regulate, authorise, oversee and supervise the companies in the financial market and has the power to enforce the regulations; including the capability to intervene and dissolve financial institutions and impose sanctions on them.

With the same objective of granting the highest level of autonomy, the SBS was also established as an Autonomous Constitutional Organism. The head of the SBS is appointed by the executive branch who must be ratified by the Congress to take office.

*The National Institute for the Defence of Free Competition and Protection of Intellectual Property (INDECOPI)*

INDECOPI was created by Law Decree No. 25868 on November 1992, and started his functions in March 1993. This institution,[29] part of the executive branch, was established as an independent arbitrator who must focus in promoting market competition, protect intellectual property, enforcing the new rules enacted at that time.[30]

The highest authority in this public entity is the Board of Directors, whose members are appointed by the executive branch (by different ministries). Despite this situation, INDECOPI has enjoyed a high degree of political autonomy and managerial freedom.

### *However, by the second half of the nineties, reforms decelerated sharply*

Similar to other Latin American economies, reforms lost dynamism in Peru by the second half of the nineties (Lora, 2012) Lack of political will and political instability were some of the factors that did not contribute to a deepening of reform and privatisation actions in the second half of the nineties (Martinez-Ortiz, 2015). At the time, privatisation process was frozen in sectors such as oil, electricity, sanitation, amongst others.[31] In the same line, concessions were paralysed and no major or additional private investment was made in roads, ports, airports, and sanitation. Additionally, administrative reform in public entities was cancelled, which left public administration and civil service reforms as some of the pending issue.

### *Decentralisation measures took place in early 2000's*

In 2001, the administration elected led a process of decentralisation with the hopes of strengthening democracy and improving the delivery of public services (Martinez-Ortiz, 2015). The Constitution was amended and new legislation passed. The decentralisation implied the transfer of functions and resources from national governments to local ones. Elections for new local authorities took place as one of the results of the process, and the elected officials started function in 2003.

Transfer of functions started in 2004, and it was reinforced in 2006 and 2008, which kept a very fast pace. However, the assessment and accreditation of local capacities, which was part of the planned decentralisation, fell short. As a result, functions were transferred without expert personnel. In parallel, the budgetary resources transferred to subnational governments increased, but in many cases no allocations were made for some of the functions transferred. Additionally, many areas of legal attribution and powers by subnational governments were not defined in detail, increasing the likelihood of conflict across different levels of government (Martinez-Ortiz, 2015).[32]

### *Significant improvements in economic growth, well-being and poverty reduction have been observed since the introduction of reforms in the 1990s and 2000s, but more reforms are needed to achieve a more inclusive and sustainable path*

Structural reforms take usually a few years to show their full impact on an economy. Peru has experienced considerable socioeconomic progress and improved well-being in the last two decades due to a combination of sound domestic policies resulting to a large extent from the reforms in previous years and favourable external conditions (see next section). The country has recorded strong economic growth since the beginning of the 21st century, which has been accompanied by a significant reduction in poverty, from around 60% in 2004 to less than 24% in 2013. While inequalities remain large and relate not only to income but also to different dimensions of well-being, they have decreased. Sound macroeconomic policies, economic openness and effective social protection programmes are largely behind this success, many of them started since the 1990s, which has also been fuelled by favourable external economic conditions.

However, in order to achieve a more inclusive and sustainable path, Peru must overcome low productivity growth, large inequalities and high and widespread informality. The current drivers of growth, which are strongly reliant on labour, capital accumulation and on the commodity exporting sector, seem insufficient to sustain further socioeconomic progress. To unlock new drivers of lasting growth and improvements in social outcomes, Peru must find ways to boost productivity growth, and to reduce inequalities and informality. They should include significant improvements in healthcare and education, the reduction of informality to increase labour quality and productivity, improvements in the tax structure to complement a sound macroeconomic framework, and a stronger public governance and greater state capacity to prioritise and implement.[33]

## Peru's macroeconomic performance has been strong over the last decade

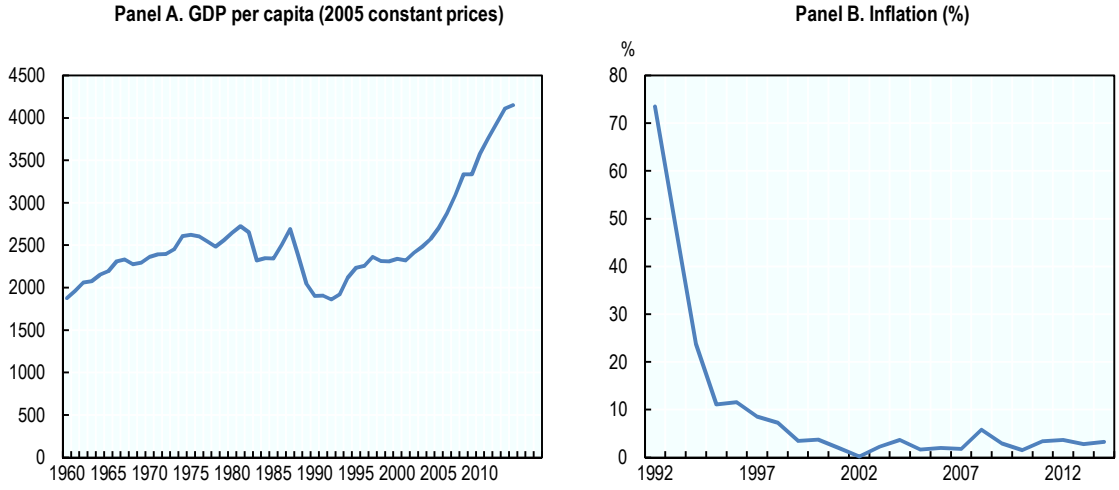
This section includes extracts of the chapter *Macroeconomic policies for inclusive development* of the OECD report *Multidimensional Review of Peru* (OECD, 2015), and it is also enriched by expert papers.

### *Peru's macroeconomic performance over the last decade has been the best in over a century*

Underpinned by better macroeconomic management and an exceptionally favourable external environment, Peru's macroeconomic performance has been strong over the last decade. Between 2004 and 2014, per capita GDP grew by an average of 5% per year – the second highest rate of growth in Latin America – and the average inflation rate was 2.6% per annum (Figure 1.1). The unemployment rate fell to historical lows; down from 9.5% in 2004 to 6% in 2014, while labour participation rose from 71% to 79% in the same period (see Chapter 2). In sum, the last decade has been, in macroeconomic terms, the best Peru has had in over a century (Seminario and Alva, 2012; Mendoza, 2013).

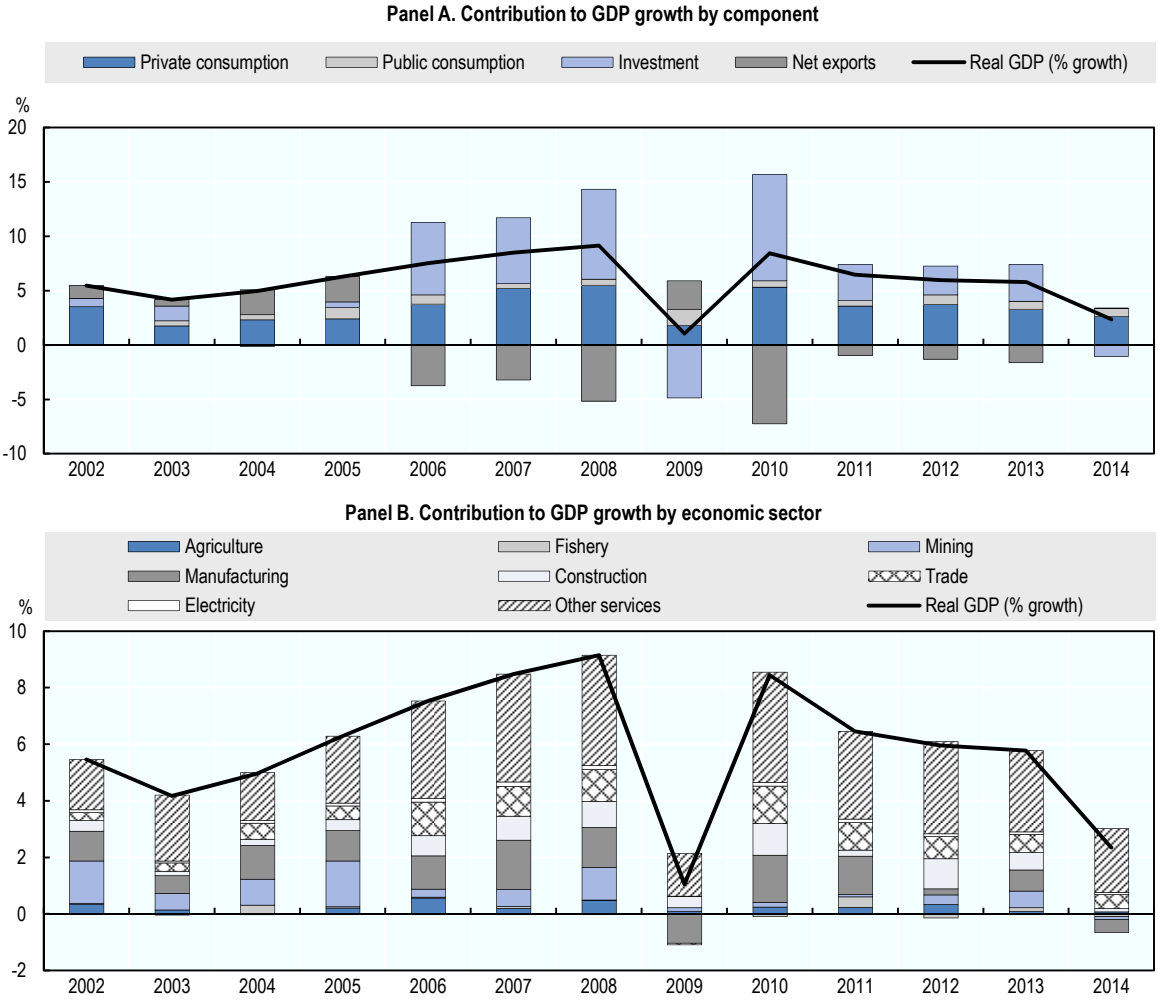
Like other Latin American countries, Peru had suffered for many decades from serious political instability, which had a negative impact on economic growth (OECD, 2015, Chapter 1; Alesina et al., 1996). But the return to democracy and the stabilising political situation have allowed the country to put in place a sound macroeconomic framework as a solid base from which to build stronger economic growth. Key plans in this framework include major changes in the design of Peru's fiscal and monetary policy, which have helped to reduce macroeconomic instability and improve the capacity of policy makers to respond to external shocks, boosting investment and growth.

Figure 1.1. **Peru's macroeconomic performance**




*Source:* World Bank (2015), World Development Indicators (database), Washington, DC, http://data.worldbank.org.

Figure 1.2. **Trends in GDP and GDP growth in Peru**




*Source*: Central Bank of Peru (*Banco de la Reserva del Perú*), www.bcrp.gob.pe/estadisticas.html.

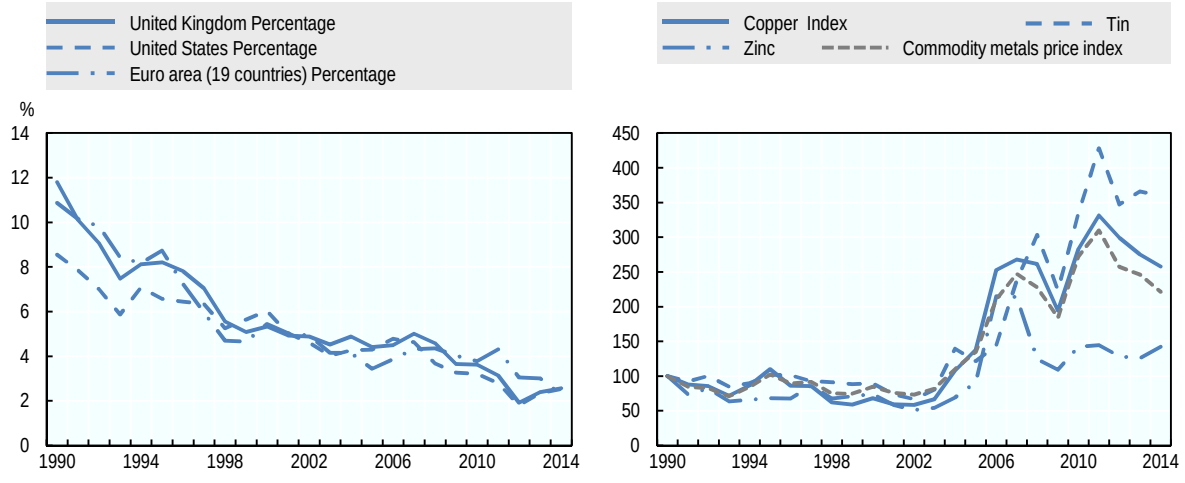
Private consumption and investments have been the leading drivers of economic growth, although their performance has weakened gradually in the last years—with more of a negative impact on investments (Figure 1.2, Panel A). For the period 2002-08, private investment accounted for 43% of GDP growth prior to the 2009 international crises. Meanwhile, private consumption accounted for an average of 68% of GDP growth over 2012-14.

From a sector's perspective, services have been the main contributor to economic performance accounting for 56% of the GDP growth over the 2012-14 (Figure 1.2. Panel B). In terms of labour productivity, however, this sector along with agriculture and commerce are the lowest performers. In contrast, the best performers in labour productivity are manufacturing, mining and transport and communications.

### *This performance is in part the result of a very favourable external environment, although diversification of the production is required to smooth external shocks…*

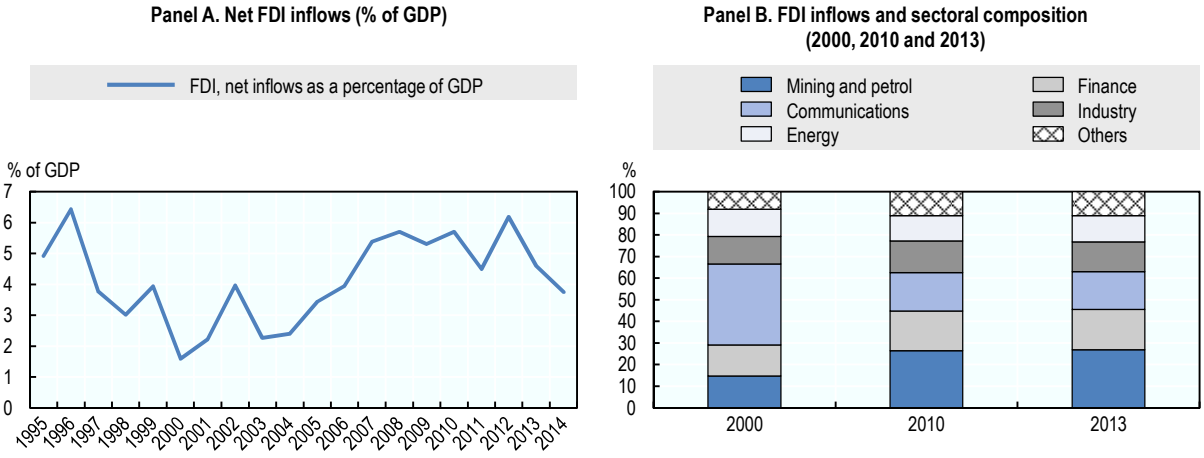
Peru has also benefitted from the exceptional external environment prevalent during the last decade. As one of the largest producers of metals in the world (OECD, 2015, Chapter 3), Peru benefited immensely from the upswing in commodity prices that started a decade ago, and which, together with record low international interest rates (Figure 1.3), had important macroeconomic implications. First, they provided a strong impulse for GDP growth, which, during the last decade, was one of the highest in Latin America. Second, high investment, especially in mining, attracted large capital inflows. More than two-thirds of these capital flows were in the form of foreign direct investment, lending relative stability to the financing of the current account. Nevertheless, over-reliance on externals conditions represents a drawback, as external shocks might jeopardise economic stability. Public policy should seek diversification of production (see below).

Figure 1.3. **The external conditions influencing Peru**




*Source:* IMF (2014), World Economic Outlook Database, International Monetary Fund, Washington D.C., www.imf.org/external/pubs/ft/weo.

Figure 1.4. **Foreign direct investment in Peru**




*Note*: "Others" in Panel B includes the following sectors: commerce, services, tourism, construction, agriculture, transport and housing.

*Source:* ProInversión (2015), Estadísticas Generales, www.proinversion.gob.pe/modulos/LAN/landing.aspx?are=0&pfl=1&lan=10&tit=proinversi%C3%B3n-institucional.

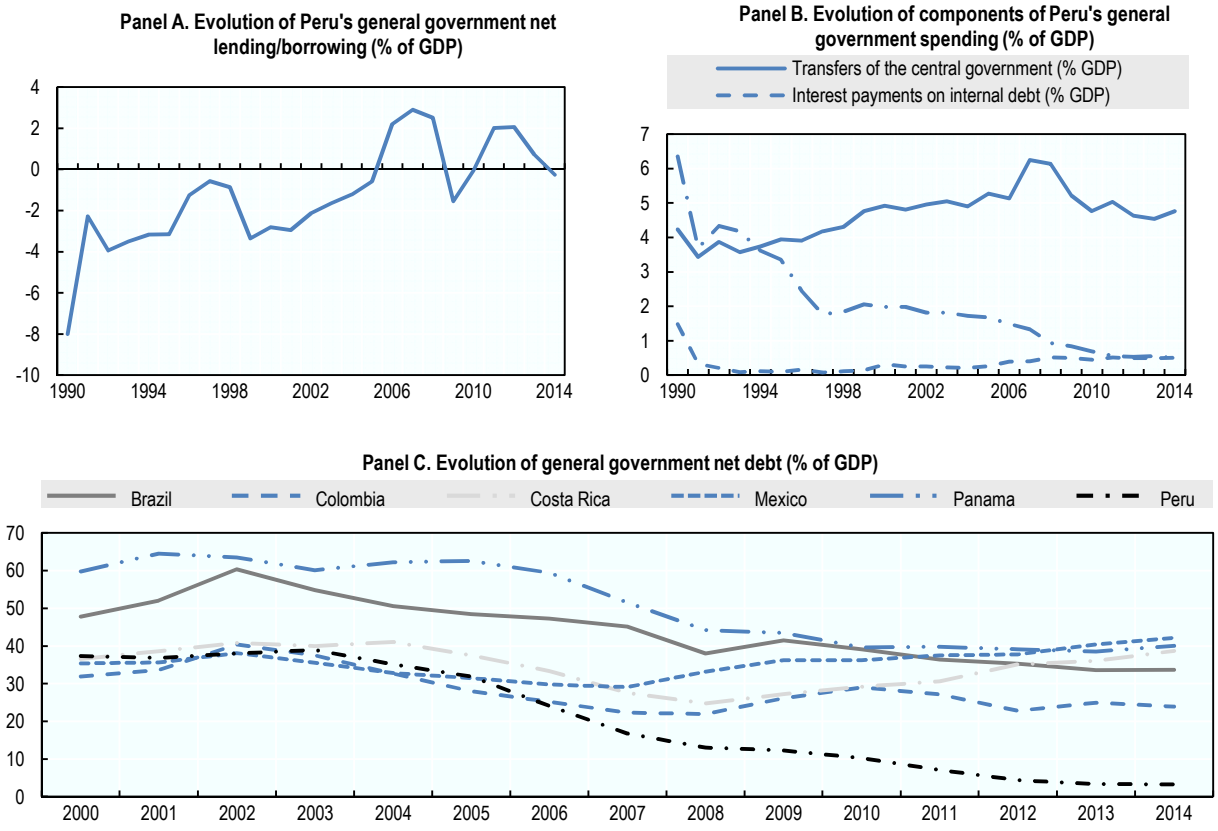
Foreign Direct Investment (FDI) inflows averaged more than 5% of GDP over the period 2010-13, and averaged close to 3.5% of GDP over the last decade (Figure 1.4, Panel A). From 2000 to 2013, the share of total FDI to the mining and petroleum industry combined increased by more than 12 percentage points, reaching 27% in 2013, the largest share of FDI for any sector (Figure 1.4, Panel B). Peru's efforts to boost production and its continual announcements of large-scale mining projects have fuelled expectations and lead to greater levels of investment in recent years. Many of Peru's largest investors, such as the United Kingdom and the United States, invest primarily in mining and petroleum. However, Spain, Peru's primary investor, concentrates its investment in communications, while the Netherlands and Chile invest more in Peru's financial industry.

### *… but is also a consequence of a successful combination of sound fiscal policy based on a fiscal responsibility law …*

Fiscal policy responsibility in Peru has gained credibility over the last decade. In the past Peru's public finances were extremely weak and often the cause of financial and economic crises. For instance, the economy operated with fiscal deficits exceeding 10% of GDP during the 1970s and 1980s. High fiscal deficits generated a sharp and unsustainable rise in the government debt-to-GDP ratio: from 29% of GDP in 1980 to 89% in 1990.

In the early 1990s, the government launched a set of constitutional changes that freed up monetary policy to be independent of fiscal policy. For instance, in 1993 Congress passed a law prohibiting the Central Bank from lending to the government. This measure, and the pensions reform of 1992 which helped reduce the large fiscal gap, saw the fiscal deficit rapidly reduce: from 9% of GDP in 1990 to a fiscal surplus of 2% of GDP in 1995 (Figure 1.5). However, by the end of that decade an expansionary fiscal policy combined with the creation of a set of tax exemptions saw the fiscal deficit re-emerge – at almost 3% of GDP.

Figure 1.5. **Fiscal debt and public borrowing in Peru, 1990-2014**




*Source:* Central Bank of Peru (*Banco de la Reserva del Perú*), www.bcrp.gob.pe/estadisticas.html and IMF (2014), World Economic Outlook Database, International Monetary Fund, Washington D.C.

The Fiscal Responsibility Law, introduced in 1999, has been very effective in strengthening public finances and reducing public debt. Since then, the management of fiscal policy has significantly improved. Between 2002 and 2007 the fiscal deficit was reduced from 2% of GDP to a surplus of 3% (Figure 1.5). Although the international crisis of 2008-09 prompted the public deficit to rise to 1.3% in 2009, since then the government resumed the downward path of fiscal deficit. Between 2010 and 2013 the government has had fiscal surplus. Consistent with the behaviour of the fiscal deficit, the public debt to GDP ratio also declined sharply over the same period (Figure 1.5).

Another strong point is that the decision-making process in the fiscal and budgetary frameworks is relatively well designed. The Ministry of Economy and Finance has made significant improvements through the Public National Investment System (OECD, 2015, Chapter 5). In addition, fiscal transparency has been enhanced by frequent and efficient fiscal reporting, such as the latest Multiannual Macroeconomic Framework (MEF, 2016). Fiscal reporting and statistics classify information according to international standards. Budgeting practices also operate according to advanced standards. The budget covers the general government, although with few exceptions, such as the Peruvian National Oil Company (PeruPetro). The strategic plan (covering 3 to 10 years) includes detailed and comprehensive medium-term macroeconomic and fiscal projections thanks to the Multiannual Macroeconomic Framework and the fact that the Multiannual Budget Plan baseline projections allow for a two-year outlook.

### *…and monetary credibility, supported by an inflation targeting regime under a highly dollarised financial system.*

Peru's sound monetary policy framework has helped to reduce inflation, supporting strong economic growth. Average inflation in Peru fell from over 100% at the beginning of the 1990s to an average of 2.6% between 2002 and 2014. The conduct of monetary policy during the last two decades can be split into two different periods. The first span, from 1990 to 2002, was one of gradual disinflation. During this period, monetary policy in Peru was implemented through a monetary target framework that used the annual growth rate of the monetary base as an intermediate target and also included instruments such as foreign exchange intervention and high reserve requirements for deposits in foreign currency. The success in disinflation during this period can be attributed to the efficient co-ordination of macroeconomic policies, with a build-up of credibility and a reduction in the consolidated public debt. Low levels of public debt have kept sovereign spreads low, helping to sustain a sharp reduction in monetary policy rates since 2000. The co-ordination between fiscal and monetary policies became the basis of the sound institutional framework that Peru has today

Since 2002, the monetary framework has been characterised by targeting under a monetary system within a highly dollarised financial system. Indeed, Peru's inflation targeting framework has a particular design, as it is the only central bank in the world to implement the framework within a highly dollarised financial system. The inflation target is 2%, with a tolerance band ranging from 1% to 3%. But the framework requires the central bank to actively intervene in the foreign exchange market to smooth out exchange rate fluctuations, which can lead to the building of international reserves as a self-insurance mechanism against negative external shocks. Since 2008, reserve requirements have been used as an active monetary control tool to moderate the impact of capital flows on domestic credit conditions in both domestic and foreign currency.

## The economic environment calls for a stronger and more effective prudential macroeconomic framework accompanied by reforms at the micro level

As a small and open economy, Peru is highly exposed to external shocks and will, therefore, be significantly affected by the shifting external environment. One important threat to Peru's growth prospects is the deteriorating economic situation in People's Republic of China (China), which has become an increasingly important destination for Peruvian exports (OECD 2015, Chapter 3). Lower economic growth in China will hurt Peru through its impact on world metal prices, and hence Peru's terms of trade and economic activity. Estimates suggest that a decrease in China's investment growth by one standard deviation is likely to reduce Peru's terms of trade and GDP growth by about 2 and 0.2 percentage points, respectively (Han, 2014).[34]

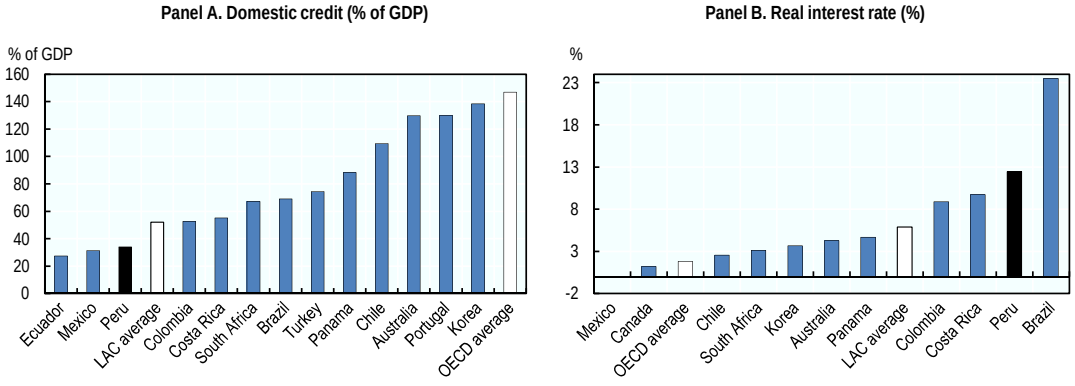
Shifting external conditions are lowering commodity prices, increasing long term dollar interest rates, weakening regional currencies and lowering flows of capital to emerging economies. All of these will put pressures on Peru's financial markets and potential growth. To better prepare the economy to adjust to the new environment, Peru should reinforce its macroeconomic framework and make sure that banks, governments, businesses and households have solid balance sheets.

### *Peru still has a relatively underdeveloped and inefficient financial market*

Overall, the financial system is in a solid position. Thanks to a strong regulatory framework, the solvency of the financial system remains good. Banks in Peru account for almost 90% of the assets of the financial system and their solvency and liquidity indicators remain strong. Non-performing loans and credit risk indicators are relatively low. For instance, as of 2014, Peru's bank regulatory capital to risk-weighted assets ratio was 14.4%, above that of Australia, Portugal and Argentina (OECD 2015, Chapter 4).

Despite increases in domestic credit to the private sector over the last decade, access to finance remains low, responding in part to the structural challenges of the Peruvian economy. In the wake of the 1998-2000 emerging markets crisis, credit to the private sector contracted from its peak of 30% of GDP in 1999 to 18% of GDP in 2004. It has since increased – to more than 31% of GDP in 2013. However, this is still very low compared to the OECD average (above 150% of GDP), and some Latin American economies, such as Chile (100% of GDP), Brazil, Colombia and Costa Rica (Figure 1.6, Panel A). To increase investment going forward, access to finance needs to increase and real interest rates need to go down. Borrowers in Peru pay an average annual real interest rate of 18% in 2013, which is significantly higher than in most countries (Figure 1.6, Panel B).

Figure 1.6. **Access to credit and the cost of finance in Peru (2013)**




*Source:* World Bank (2015), World Development Indicators (database), Washington, D.C., http://data.worldbank.org.

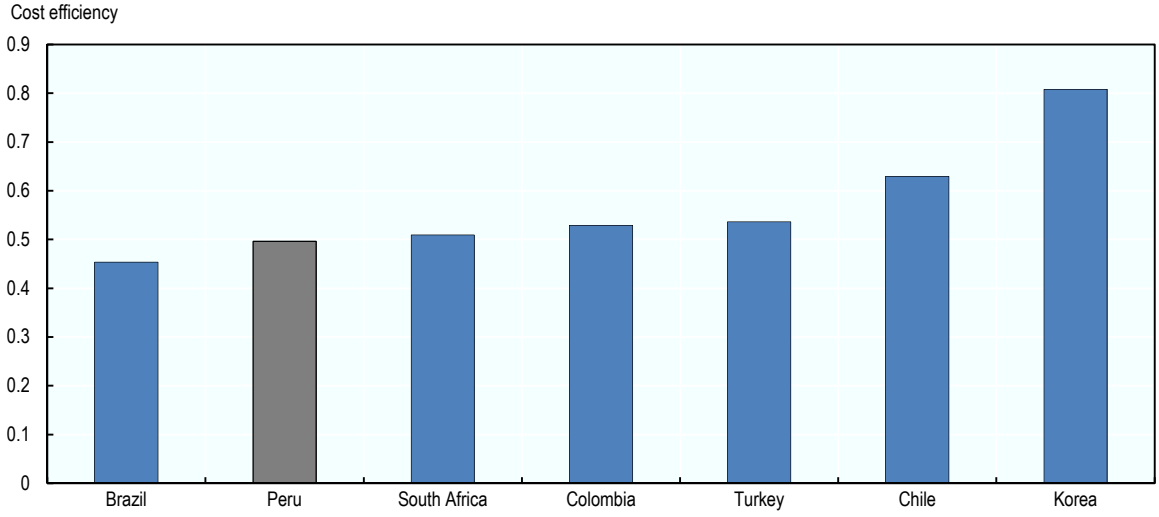
In addition, Peru's banking sector has a large degree of concentration and has lower efficiency compared to other countries. The degree of concentration of credit and deposits from financial entities remains high, responding in part to previous financial crises. In particular, close to 80% of the market share is retained by only four banks in Peru. The Herfindahl-Hirschman Index (HHI) in lending (corporate, large enterprises, medium enterprises) and on mortgages shows a relatively high level of concentration: at between 1 500 and 2 500 (Financial Stability Report, 2014).[35] Estimates of cost efficiency and market contestability show that efficiency in Peru's banking system is relatively low (Figure 1.7). Recent evidence from Latin American countries shows that efficiency and competition are the main determinants of interest rates (Chortareasa et al., 2012). Thus, improving efficiency could be a key driver of lower interest rates (Brock and Rojas-Suárez, 2000). Furthermore, concentration of business activities within a public institution creates distortions in the market. In particular, *Banco de la Nación*

concentrates some public payments, such as subsidies to low-income households, affecting efficiency in the access to finance.

### *Also, the high level of dollarisation of the financial system increases the economy's vulnerability to external shocks*

Dollarisation distorts the transmission mechanism of monetary policy and increases liquidity and solvency risks within the financial system. Because of the high degree of dollarisation in the financial system, the Central Bank of Peru since 2013 has taken several steps to induce a faster reduction in credit dollarisation (Castillo et. al., 2016). Additionally it has to intervene frequently in the foreign exchange market to reduce exchange rate volatility and accumulate international reserves to prevent balance sheet effects. In a financially dollarised economy, the interest rate setting also has to take into account how financial dollarisation affects the transmission mechanism of monetary policy. The central bank addresses this issue by explicitly taking into account the impact of dollarisation on credit market conditions and on the dynamics of the exchange rate and inflation (Winkelried, 2013). Dollarisation reduces the impact of monetary policy on inflation and real activity, since a large depreciation not only typically generates a positive impact on exports, but also triggers a negative impact on the financial position of firms with currency mismatches. In sum, the role of credit in the transmission of monetary policy is relatively weak, but would improve if Peru reduced its levels of dollarisation.

Figure 1.7. **Peru's efficiency in the banking system**




*Notes:* Cost efficiency is a measure of the relative distance from the efficient frontier. It ranges between 1 for a fully efficient and 0 for a fully inefficient firm. The selection of benchmark countries is based on data availability.

*Source:* Daude, C. and J. Pascal (2015), "Efficiency and contestability in the Colombian banking system", *OECD Economics Department Working Papers*, No. 1203, OECD Publishing, Paris, http://dx.doi.org/10.1787/5js30twjgm6l-en.

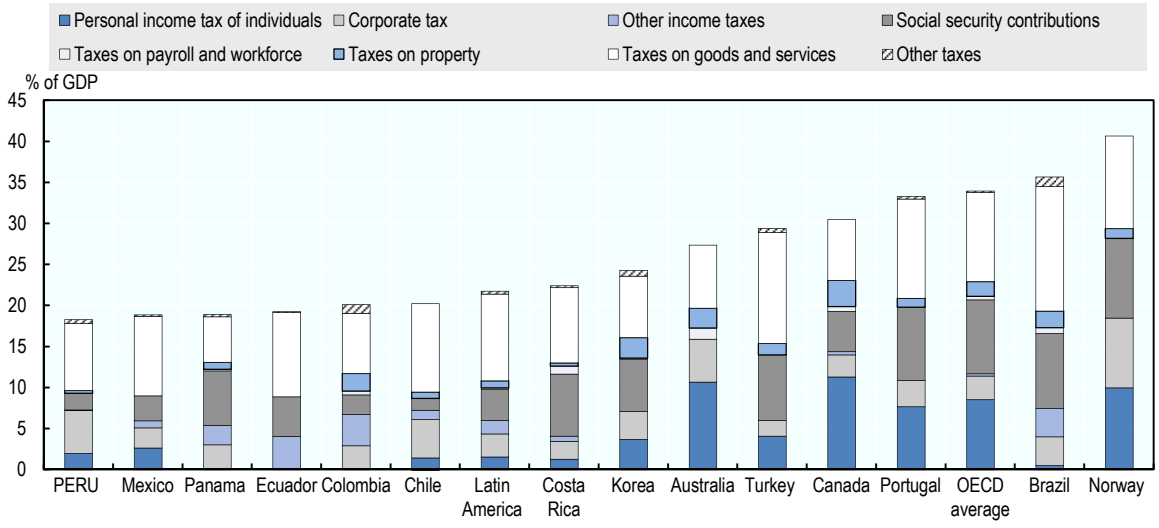
### *Finally, a comprehensive fiscal reform is needed to improve the efficiency and equity of the tax system, and in particular to increase fiscal revenues*

A key challenge for Peru is to improve its tax policy so as to turn revenues into a more effective tool for economic and social development. The current tax system does not raise sufficient revenues to finance the provision of the services needed to stimulate

inclusive and sustainable economic growth. More revenues need to be raised to finance investment in education and skills, infrastructure, and innovation. In the context of the emergence of the middle class, there is a need to provide more and better quality of public services. Social expenditure and infrastructure needs will also require more revenue in the near future. To achieve this objective, it is essential that Peru consolidates the fiscal legitimacy achieved through the public governance improvements.

Tax revenues in Peru are still low compared to benchmark, OECD and Latin American countries (see Annex 1.A1 of OECD 2015, Chapter 1 for a description of benchmark countries). While tax revenues represented 18.3% of Peru's GDP in 2013, the average share in Latin American and OECD countries was 21.3% and 34.1%, respectively (OECD/ECLAC/CIAT/IADB, 2015). Fiscal resources are also lower than in all benchmark countries (Figure 1.8).

Figure 1.8. **Tax revenues as % of GDP, 2013**



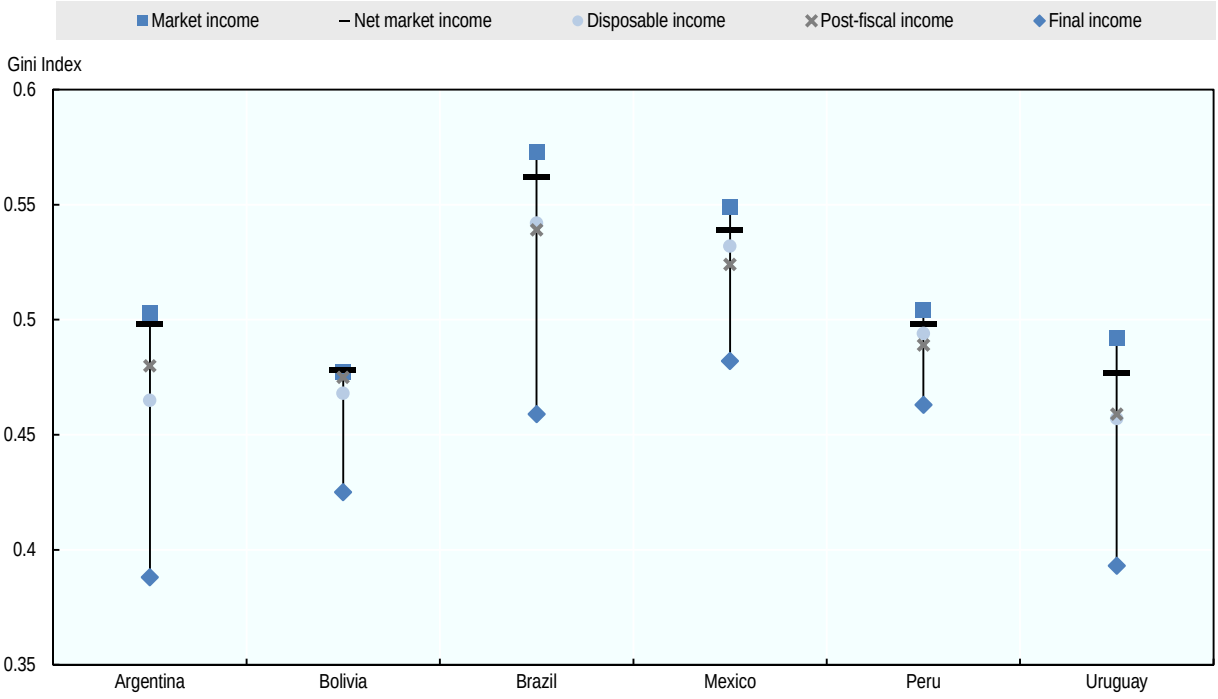

*Note:* 2012 data for Australia.

*Source*: OECD/ECLAC/CIAT/IADB (2015), Revenue Statistics in Latin America and the Caribbean, OECD Publishing, Paris http://dx.doi.org/10.1787/rev_lat-2015-en-fr.

Redistributive mechanisms, such as taxes and social transfers, do little to reduce income inequalities in Peru. The impact of taxes and transfers on reducing inequalities remains well below that of some other countries in the region (Figure 1.9). This is directly linked to the ineffectiveness of direct transfers, which largely involve in-kind transfers for free or subsidised government services in education and health (Lustig and Higgins, 2013). The effectiveness indicator of social expenditure (i.e. the ratio between the variation of the Gini index and the size of direct transfers as a percentage of GDP) is very low, with only Bolivia performing below Peru within the group of countries portrayed in Figure 1.9 (Lustig and Higgins, 2013). Moreover, while in Peru inequalities only decline by 2 percentage points after taxes and transfers, in OECD economies they decline by more than 15 percentage points (OECD/ECLAC, 2012). Improvements in fiscal legitimacy at national and subnational levels are fundamental to increase progressivity and tax revenues in Peru.

Tax evasion should be tackled in order to increase fiscal space in Peru. Evasion hinders development and inclusive growth and undermines the overall sense of fairness on which the taxation system should be based (Carrasco, 2010). Although it is difficult to estimate tax evasion, studies show that Peru is one of the Latin American economies with the highest levels of tax evasion. In particular, estimated evasion rates for VAT and income taxes are close to 38% and 48%, respectively (Gómez-Sabaini and Jiménez, 2012). Beyond the tax structure, better information systems, and increased transparency and integrity in tax administration operations are fundamental for tackling tax evasion. Moreover, in an international context it is important to ensure that profits are taxed in the country where economic activities generating the profits are performed and where value is created. Like in other developing and emerging markets, base erosion and profit shifting (BEPS) is of major significance for Peru due to its heavy reliance on corporate income tax, particularly from multinational enterprises. Further involvement of Peru in this OECD work in the framework of the Country Programme would help to minimise base erosion and profit shifting.

Figure 1.9. **Impact of taxes and transfers on income distribution**




*Source:* Lustig et al. (2013), "The impact of taxes and social spending on inequality and poverty in Argentina, Bolivia, Brazil, Mexico, Peru and Uruguay: An overview", *CEQ Working Paper*, No. 13, CEQ.

## Conclusions

Peru implemented bold and ambitious reforms in the 1990s, which laid the foundations of a strong macroeconomic performance in the last decade, as well as for the improvement of social conditions. A combination of promotion of private investment, market oriented policies, elimination of state monopolies and controls, and a new regulatory framework to pursue competition and protections of the public, along with the corresponding regulatory agencies for supervision and oversight, led Peru in a path of

economic growth and poverty reduction during the last decade. However, in order to achieve a more inclusive and sustainable path, Peru must find ways to boost productivity growth, and to reduce inequalities and informality.

In terms of macroeconomic performance, credible macroeconomic framework has been crucial for increasing economic stability and boosting economic growth in Peru. Initiated in the 1990s, it has improved the country's monetary and fiscal stances remarkably. The adoption of an inflation targeting regime to increase stability in the monetary front and the implementation of a fiscal rule to avoid volatility in the public finances contributed to boosting investment and improving consumers' confidence.

However, some risks remain on the macroeconomic front as external conditions become less favourable Shifting external conditions are lowering commodity prices, increasing long term dollar interest rates, weakening regional currencies and lowering flows of capital to emerging economies. All of these will put pressures on Peru's financial markets and potential growth. To better prepare the economy to adjust to the new environment, Peru should reinforce its macroeconomic framework and make sure that banks, governments, businesses and households have solid balance sheets.

# Notes

1. During this time, Peru suffered from terrorist attacks which targeted the civil population, police forces and public and economic infrastructure.
2. According to the 1979 Constitution, the Legislative Branch (the Congress) may give power (delegate) trough and Act, to the President of the Republic (the Executive Branch). With this powers the President could approve and enact legislative instrument called Legislative Decrees. This legislative decrees have the same value, force and level of legislation (Acts) approved by the Congress. Therefore, a legislative decree from the Executive Branch could change, modify or nullify Acts from the Congress.
3. Legislative Decree No. 757, Act for the Growth of the Private Investment.
4. Idem.
5. Idem.
6. Legislative Decree No. 662, Act for the Promotion of Foreign Investment.
7. Idem.
8. Idem.
9. Legislative Decree No. 708, the Act for the Investment Promotion in the Mining Sector.
10. Legislative Decree No. 644, Act for the Elimination of Administrative and Legal Obstacles and Restrictions that Block the Free Access to the International Routes and Traffic for the National Shipping Companies; Legislative Decree No. 645, Act that Grants Faculties to the Cooperatives and Business to Conduct Tasks of Loading, Unloading, Transhipment and Cargo Handling in Merchant Ships at Sea, River and Lake Ports; and Legislative Decree No. 670 Reform to the Civil Aviation Law No. 24882.
11. Legislative Decree No. 649, Act for the Investment Promotion in the Electricity Sector.
12. Legislative Decree No. 702, Act for the Investment Promotion in the Telecommunications Sector.
13. The organization, responsibilities, and functions of the regulatory agencies OSINERGMIN, OSIPTEL, along with SUNASS (National Superintendence of Sanitation Services) and OSITRAN (Supervisory Agency for Investment in Public Transport Infrastructure), were later consolidated in the Law 27332: Framework Law of the Regulatory Organisms of the Private Investment in Public Services. The governance of these independent regulators is described and analysed in Chapter 7.
14. Legislative Decree No. 637, General Act of Banking, Financial and Insurance Institutions.
15. Legislative Decree No. 668, Act to guarantee freedom of international and foreign trade and internal commerce.

16. Legislative Decree No. 674, Act for the Promotion of Private Investment in State Owned Enterprises.

17. Idem.

18. Idem.

19. Legislative Decree No. 758, Act for the Private Investment in Public Services Infrastructure.

20. Usually one Ministry at the time.

21. In this contract, the private party usually assumed the financing of the infrastructure. In return, it had the right to charge fees to users.

22. This included the built, maintenance, management, operation and exploit of roads, highways, railroads, electric infrastructure, airports, and hospitals, among others.

23. Legislative Decree No. 757, Act for the Growth of the Private Investment.

24. Legislative Decree No. 757, Act for the Growth of the Private Investment. For a description and assessment of recent efforts on administrative simplification, please see Chapter 4.

25. Legislative Decree No. 701, Act for the elimination of Anticompetitive Practices.

26. Legislative Decree 716, Consumer Protection Act.

27. Legislative Decree 691, Publicity Act.

28. These are some examples of the new public agencies created in the context of the reforms. However more agencies were created, for example, the National Superintendence of Customs and Tax Administration (SUNAT), and the utilities regulatory agencies: OSIPTEL, OSINERGMIN, OSITRAN, and SUNASS. See Chapter 7 for a description and assessment of the governance arrangements of the latter.

29. INDECOPI had to enforce market rules related to free competition, dumping and subsidies control, consumer protection, unfair competition, technical and commercial standards, market access, market exit, trademark, patents and copyrights.

30. See Chapters 2, 4 and 5 for a description and assessment of the current functions of INDECOPI related to regulatory policy.

31. Reforms in these sectors were undertaken later on. Amongst others, it included measures to implement a free trade agreement with the USA which led to the update of the regulatory framework, including new powers for INDECOPI, regulation on copyright linked to innovation, and a new law on customs, amongst the most relevant. See OECD (2015) for a general description and assessment of the recent competitiveness and economic diversification of Peru.

32. In the forthcoming publication of the OECD Review of Public Governance of Peru, the decentralisation process is described and assessed in detail.

33. For a detailed discussion and assessment of these elements, see OECD (2015).

34. In Nolasco et al. (2016), using a similar model to Han (2014), more external sources of economic growth are quantified, including the USA. According to their calculation, these external sources at times accounted for as much as 40% of growth during the 2000s.

35. The Herfindahl-Hirschman Index (HHI) can range from close to 0 to 10 000. It approaches zero when a market is occupied by a large number of firms of relatively equal size and reaches its maximum of 10 000 points when a market is controlled by a single firm. According to the US Department of Justice, the agencies generally consider markets in which the HHI is between 1 500 and 2 500 points to be moderately concentrated, and consider markets in which the HHI is in excess of 2 500 points to be highly concentrated.

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*Chapter 2*

# Policies and institutions for regulatory policy in Peru

*Peru has a centralised system of government which comprises the executive, legislative and judiciary powers. Peru does not have a legal or policy statement for the application of a whole-of-government regulatory policy. Instead, it has specific elements that purse regulatory quality embedded in numerous legal documents. Mirroring the scattered elements of regulatory quality included across legal and policy instruments, the institutional landscape of Peru also offers a view in which legal attributions, practices, and efforts on regulatory policy are dispersed across several agencies, without articulated efforts for co-ordination, with some specific exceptions. Peru should consider issuing a policy statement on regulatory policy with clear objectives, and considering including this statement as part of a law or another legal document with binding capabilities. Peru should also aspire at establishing an oversight body which concentrates regulatory policy activities and tools currently spread across several ministries, agencies and offices.*

The objective of regulatory policy is to ensure that regulations and regulatory frameworks are in the public interest. For regulatory policy to be effective, it must have political commitment of the highest level, follow a whole-of-government approach, and have an array of institutions to make this policy work, including oversight bodies. This chapter discusses the current legal and institutional arrangement of Peru to pursue a regulatory policy, including any policy statements and programmes that help implement the policy of regulatory quality.

## Main government structure and organisation in Peru

In this section, a brief description of the main structure and organisation of the government of Peru is presented. It also includes short explanations of the most relevant ministries, agencies, as well as the Congress and subnational governments. The objective is to present a broad picture of the way the Peruvian government is organised.

### *General organisation*

Peru has a centralised system of government which comprises the executive, legislative and judiciary powers. At the central level, there are some public bodies with varying degrees of independence that goes from decentralised to autonomous entities in charge of specific portfolios. As an example, within the executive branch there are economic and social regulators. Economic regulators have as a main feature administrative autonomy but they are still ascribed to the Presidency of the Council of Ministers (PCM). In contrast, social regulators comprise traditional and modern regulators, their degree of autonomy varies but in general is lower compared to economic regulators, and focus on highly specialised topics such as competition, commerce, consumer protection, such as National Institute for the Defence of competition and Protection of Intellectual Property (INDECOPI), Environmental Evaluation and Enforcement Agency (OEFA), SUNAFIL, amongst others.

Figure 2.1 shows the structure of the Peruvian government and how disaggregated it is at the legislative, judicial and executive level, as well as for autonomous bodies and at the regional and local levels of governments. Figure 2.2 further expands the ministries belonging to the executive power and the regulatory agencies ascribed to the Presidency of Council of Ministers.

### *Presidency of Council of Ministers*

The Council of Ministers is a body which gathers the heads of each of the ministries in the executive branch. The Council is headed by a President (see Box 2.1). Its main functions include: the co-ordination and evaluation of the general policy of the government (which includes national, sectorial and multi-sectorial); decision making in public interest affairs; the promotion of development; and the welfare of the population.[1]

The PCM has a strong empowerment within the Peruvian Government. It co-ordinates the relationships with the legislative and the judiciary powers, as well as with constitutional autonomous bodies (e.g. Central Bank) and with the regional and local governments.[2]

### Box 2.1. **Functions and powers of the Council of Ministers**

According to Article 125 of Peruvian Constitution and to Article of the 16 Organic Law of the Executive Branch No. 29158 (LOPE, *Ley Orgánica del Poder Ejecutivo*), the Council of Ministers has powers to:

- Approve the law projects that the Peruvian President submits to Congress;
- Approve the legislative and the urgent decrees ordered by the Peruvian President;
- Discuss and implement matters of public interest;
- Co-ordinate and evaluate the general policy of the government, as well as the national, sectorial and multi-sectorial policies; and
- Promote the development and wellbeing of the population.

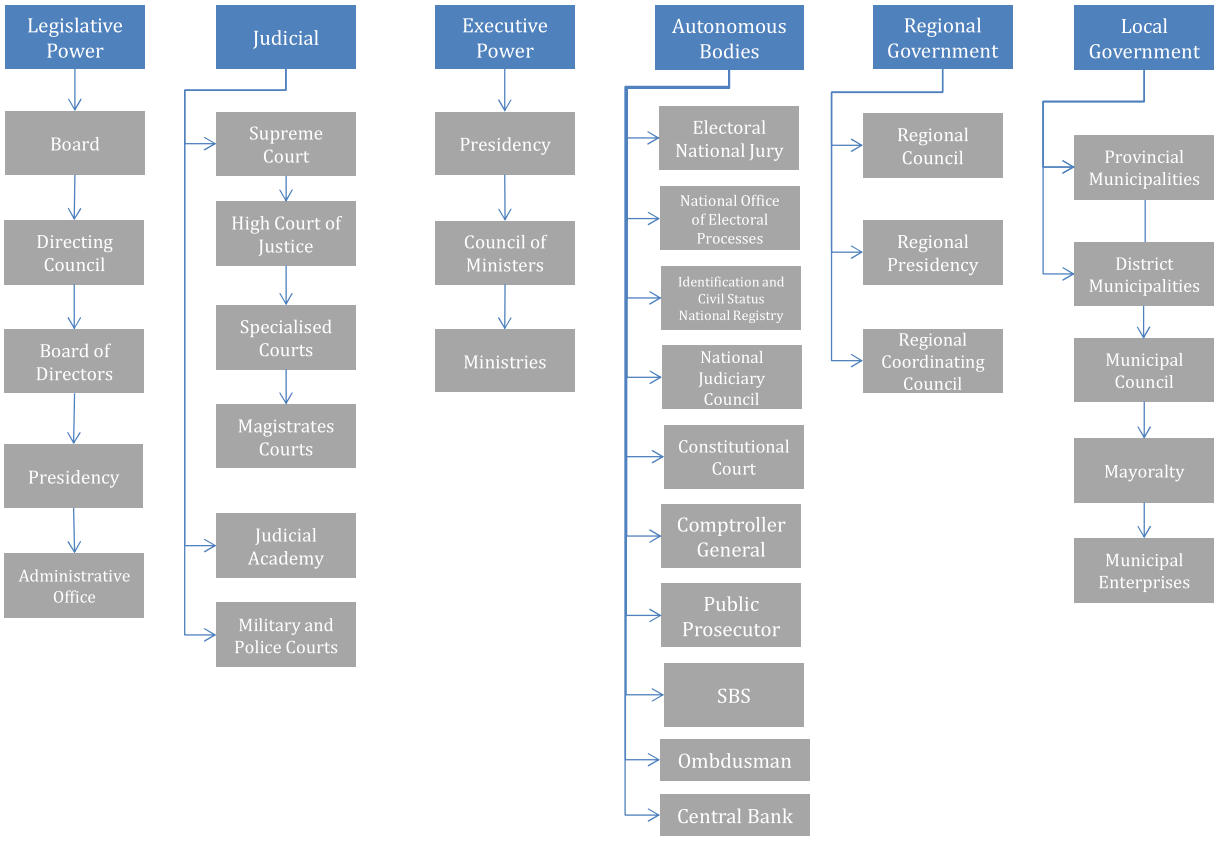
The Council of Ministers is chaired by the President of the Council. However, the Council is to be chaired by the President when he convenes the Council or attends the sessions (Art. 15, Political Constitution of Peru). It is within the powers of the President of the Council to: i) be the official spokesman of the government in the absence of the President; ii) co-ordinate the functions of the other ministers; iii) endorse the legislative and urgent decrees approved by the Council of Ministers (Art. 123, Political Constitution of Peru); iv) promote government objectives; v) co-ordinate the multi-sectorial policies, especially those that involve the economic and social development of the nation; vi) supervise the actions of the bodies related to the Presidency of the Council of Ministers (Art. 18 LOPE); amongst others.

The Presidency of the Council of Ministers is the ministry in charge of the co-ordination of the national and sectorial policies of the executive branch. It co-ordinates the relation with the other government branches, the constitutional agencies, regional and local governments, and the civil society (Art. 17, LOPE).

According to the Political Constitution of Peru, every Council agreement requires the approving vote of the majority of its members (Art. 125), thus, any act implemented by the Peruvian President that does not include the countersign of the Council is considered null (Art. 120). The members of the Council of Ministers are also allowed to assist and participate in Congress sessions, although, without the right to vote. The attendance to the sessions is to be done periodically by at least one member of the Council (Art. 129).

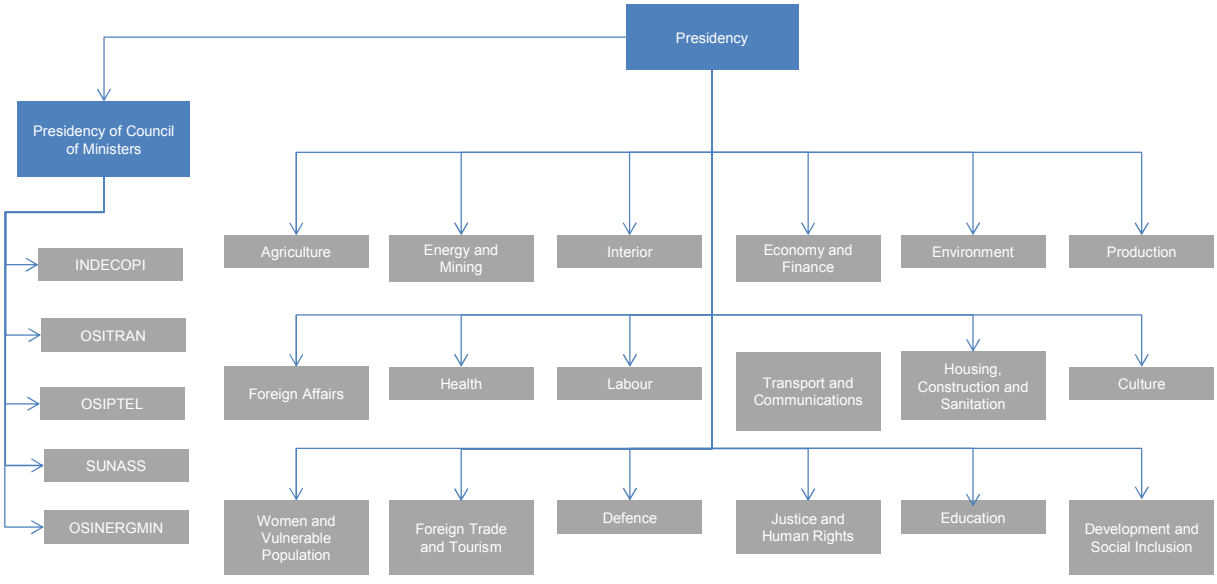
*Source:* Organic Law of the Executive Branch No. 29158 (*Ley Orgánica del Poder Ejecutivo*).

Figure 2.1. **Structure of the Peruvian government**




*Source*: Prepared by the OECD from information published by the Public Management Secretary, http://www2.congreso.gob.pe/sicr/cendocbib/con4_uibd.nsf/92f5739e20dfd56105257bff00577d02/$file/estado.pdf.

Figure 2.2. **Structure of the executive branch of the Peruvian government**




*Source*: Prepared by the OECD from information published by the Public Management Secretary, http://www2.congreso.gob.pe/sicr/cendocbib/con4_uibd.nsf/92F5739E20DFD56105257BFF00577D02/$FILE/estado.pdf.

### *Ministry of Economy and Finance*

The Ministry of Economy and Finance (MEF, *Ministerio de Economía y Finanzas*) is in charge of planning, leading, and controlling all matters related to policy on tax, customs, financial system, indebtedness, foreign trade public budget, finance and accountability, as well as overseeing the national economy. The MEF also evaluates and ratifies all measures that restrict national and international trade of goods and services.

Together with the PCM and the Ministry of Justice and Human Rights (MINJUS, *Ministerio de Justicia y Derechos Humanos*), the MEF has a central role on regulatory quality efforts. Some of the MEF activities on regulatory policy include: administrative simplification, international regulatory co-operation and intergovernmental co-ordination, performance-based regulation, *ex ante* impact assessments of regulation, governmental transparency and consultation (see Section *Institutions for regulatory quality in Peru*). It is this capacity to assess draft policies with potential impact on commerce, along with other cross-cutting legal attribution, that allows the MEF to review draft regulation.

### *Ministry of Justice and Human Rights*

The Ministry of Justice and Human Rights (MINJUS) acts as a legal advisory body for the executive branch. Together with the PCM and the MEF is one of the most influential ministries in the executive branch, as it has a horizontal perspective on government issues. In broad terms, the MINJUS has tasks on improving the quality of the rule of law. It has to assure that the executive branch performs its duties inside the Political Constitution of Peru, this is mainly performed by giving legal advisory through opinions on the regulatory projects. It is also the agency within the executive branch responsible to co-ordinate with the judicial power, the Public Prosecutor and every other instance linked to the administration of the judicial system.

### *Economic regulators*

A keystone in modern institutional design of public entities in Peru was set with the creation of four economic regulators: the National Superintendence of Sanitation Services *(SUNASS)*, the Supervisory Agency for Private Investment in Telecommunications (OSIPTEL), the Supervisory Agency for Investment in Energy and Mining (OSINERGMIN) and the Supervisory Agency for Investment in Public Transport Infrastructure (*OSITRAN*). The defining features of these entities derives from their institutional design as administrative independent bodies from the central government, their funding scheme through industry earnings, and the collegiate decision making body.

These regulators are defined as Specialized Technical Agencies[3] but their formal constitution is established in specific law decrees.[4] Their main legal powers are indicated in the Law No. 27332: Framework Law on Regulatory Agencies for Private Investment in Public Utilities (LMOR *Ley Marco de los Organismos Reguladores de la Inversión Privada en los Servicios Públicos*), enacted in 2000. This law allows such regulators to supervise, regulate, norm and inspect the sector activity of regulated entities.

These regulators have as their main tasks monitoring and implementation of the regulation designed to improve the development of relevant economic sectors in the country. In order to comply with their functions, these entities are ruled by general and specific regulation. They follow laws and regulation designed for general public entities as the transparency obligations, but they are also subject to specific regulation as their general rules of procedure.

The scope of intervention modalities of the economic regulators goes from issuing of norms and regulation for firms and consumers within the sector (economic, administrative and technical), to the supervision and inspection of compliance of such regulations; as well as the imposition of sanctions due to infringements, and solution of controversies and complaints. Such functions are stated in the general regulation of each regulator (see Box 2.2).[5]

### Box 2.2. **Institutional design and legal powers of economic regulators in Peru**

In Peru, four utilities regulators are in charge of the supervision of main open-to-private-investment markets. Their institutional design and faculties are explained in the next lines.

SUNASS, the National Superintendence of Sanitation Services, was created on December 19th, 1992. The agency is in charge of managing the market's regulatory framework in water and sanitation provision, the economic regulation of prices and tariff structure in these sectors, overseeing the quality and coverage of the services, verifying that the commitments assumed by the firms in the sector are met, auditing and imposing sanctions, and the settlement of customer complaints.

OSIPTEL, the Supervisory Agency for Private Investment in Telecommunications, was created on July 11th, 1991 with the goal of protecting the telecommunication public services market from practices against free and fair competition. The agency is in charge of regulating and supervising the telecommunication market. Also, OSIPTEL has the authority to fix the tariff structure, manage and issue regulatory instruments and, it can establish and impose sanctions and corrective measures to firms when needed. Furthermore, it has the exclusive role to settle complaints and controversies.

OSINERGMIN, the Supervisory Agency for Investment in Energy and Mining, was created on December 31st, 1996 with the responsibility of regulating and supervising the companies in the electricity and hydrocarbon sectors. Then, on the year 2007, the mining sector was incorporated to its scope. The agency is in charge of fixing tariffs and monitoring the activities of the companies to verify they comply with the regulatory framework, including risk management and health policies. Additionally, it seeks to guarantee that the companies in the electricity, hydrocarbon and mining sectors provide a permanent, safe and high quality service to the population of Peru.

OSITRAN, the Supervisory Agency for Investment in Public Transport Infrastructure, was created in January of 1998. It is in charge of supervising, regulating, auditing, sanctioning, settling controversies and responding to complaints about the activities and services involved in the use of the infrastructure of public transport and its market. Its goal to guarantee the efficient operation of the market is sought by regulating and supervising the companies holding concessions for air services, seaport services, railways and highways.

These regulatory agencies have administrative, functional, technical, economic and financial autonomy since the year 2000, when the Law No. 27332 was enacted. The entities became independent to define their technical guidelines, their objectives and strategies.

Afterwards, with the publication of the Law No. 29158 in 2007, the agencies were recognised as decentralised bodies of the executive branch, were given nationwide competences and were assigned to the Presidency of the Council of Ministers. The latter implies that any organisational, institutional or functional change requires approval by the Council of Ministries.

*Source*: Adapted from the SUNASS website: www.sunass.gob.pe/; OSIPTEL website: https://www.osiptel.gob.pe/; OSINERGMIN website: www.osinergmin.gob.pe/ and OSITRAN website: www.ositran.gob.pe/ (accessed 6 April 2016).

### *Congress*

The Peruvian Congress is composed by 130 congressmen serving 5-year terms, selected trough an electoral process. In Peru, the parliamentary organisation is divided by the Plenary Session, the Directive Council, the Directive Board, the Presidency and the Administrative Office. Its legislative work is organised by the Ordinary Commissions, the Permanent Commission and the Parliamentary Groups.

The functions of the Congress can be separated into the legislative affairs, the public control and the special activities. The first function comprises the debate and approval of Constitutional and law-level reforms, as well as the interpretation, modification and abrogation of articles of the Constitution, the law collection and the legislative resolutions. The public control functions include the delegation of legislative faculties; the installation of the Council of Ministries; the realisation of investigations and agreements about the government behaviour, the inspection about the usage of public goods, amongst the most important. Finally, the special functions are the designation of the treasury inspector, the members of the constitutional trial, the directives of the Reserve Central Bank (*Banco Central de la Reserva*) and the Superintendence of Banking, Insurance and Private Pension Fund Administrators (SBS).

### *Subnational governments*

Besides the national government in Peru, there are three subnational layers of regulation: the Regional Government, the Provincial Local Government and the District Local Government. These governments' levels have exclusive and joint functions which are described in the Peruvian Political Constitution (CPP), the LOPE, the Organic Law of Regional Governments (LOGR, *Ley Orgánica de Gobiernos Regionales*) and the Organic Law of Municipalities (LOM, *Ley Orgánica de Municipalidades*) (see Box 2.3).[6]

Box 2.3. **Main regulatory framework for subnational governments in Peru**

**The Organic Law of Regional Governments, Law No. 27867**

Published on 18 November 2002, the law establishes and regulates the regional governments' structure, organisation, faculties, and duties, and defines the regional governments as decentralised or de-concentrated according to the Constitution and the Law of Decentralization Bases. The Law gives regional governments legal personality, with political, economic, and administrative autonomy, in matters falling under their legal powers.

According to the present Law, regional governments have two kinds of powers: exclusive and joint faculties with the central government. The regional governments have the exclusive legal power to plan the comprehensive development of their own region; implement socio-economic programmes; develop the Regional Development Plan; approve its internal organisation and budget; promote the modernisation of small and medium regional enterprises; promote investments in infrastructure, regional utilities, watersheds, economic corridors and touristic circuits; facilitate the access to international markets for their region's products and services; manage and assign urban and vacant land; promote sustainable use of forest resources and biodiversity; develop regulation on subjects under their powers; among others.

The joint faculties of the regional governments include education services; public health; regulating and developing economic and productive activities for agriculture, fisheries, industry, trade, tourism, energy, oil, mining, transport, communications, and environment; dissemination of culture, among others.

Box 2.3. **Main regulatory framework for subnational governments in Peru** (*cont.*)

**The Organic Law of Municipalities, Law No. 27972**

Published on 26 May 2003, the Organic Law of Municipalities establishes the rules on the creation, origin, nature, autonomy, organisation, purpose, types, faculties, classification, and economic regime of municipalities; also on the relationship between them and with other State and private organisations; as well as mechanisms for citizen participation and special regimes for municipalities.

This Law defines the local governments as basic entities in the territorial organisation of the State. These bodies represent the neighbourhood; promote the appropriate provision of local public services and of a comprehensive, sustainable, and harmonic development of its constituency. Local governments have legal personality and political, economic and administrative autonomy in matters under their powers.

The LOM classifies municipalities according to 1) their jurisdiction, into provincial, district and populated centres; and 2) their special regime, as the Metropolitan Municipality of Lima and the border municipalities.

The Law of Decentralization Bases and the LOM give the provincial and district municipalities exclusive and joint legal powers. The exclusive faculties of provincial municipalities consist on planning the local development and territorial order; promote strategic co-ordination with the district's development plans; promote, and implement investment projects and public services subject to externalities or economies of scale; issue technical standards on organizing physical space and land use, and on the protection and preservation of the environment.

The provincial and district municipalities have exclusive and joint legal powers on promoting, regulating and issuing regulation on the fields of: organisation of physical space and land use; local public services; protection and preservation of the environment, local economy development; neighbourhood participation; local social services; prevention, rehabilitation and fight against drug use.

*Source:* Adapted from The Organic Law of Regional Governments of Peru and the Organic Law of Municipalities of Peru.

## Policies for regulatory quality in Peru

Peru does not have a legal or policy statement for the application of a whole-of-government regulatory policy. Instead, it has specific elements that pursue regulatory quality embedded in numerous legal documents. Elements of administrative simplification such as digitalisation, establishment of digital consulting platforms, elimination or reduction of burdens are the most common elements of regulatory policy. Other aspects regarding legal quality and standardisation, as well as goals to implement Regulatory Impact Assessment (RIA) are also found in the legal and policy framework of Peru. This section will outline the main documents that contain elements of regulatory policy.

### *Political Constitution of Peru*

The Political Constitution of Peru delegates regulatory activities to the national, regional and local level governments, as well as to Congress and the constitutionally autonomous bodies. Similarly, there are areas in which there are joint legal powers to

regulate. However, the constitution does not contain any provision to oblige any public entity to perform specific regulatory quality activities.

At the national level, the exclusive legal competences include the design and supervision of national and sector policies. The national government also has functions regarding foreign affairs, defence and national security, justice, internal security, treasury and taxes, commerce and tariffs, marine and aviation regulation, public service regulations, nationwide infrastructure.

Subnational governments of Peru hold responsibilities on promotion and regulation of economic and social issues and the Constitution grants the regional governments the faculty to regulate and grant authorisations, licences and rights for the services of their responsibilities. They have to dictate also the regulations with focus to its regional management. In terms of specific regulation, the regional governments have the task to regulate the agriculture, fishery, agroindustry, trade, tourism, energy, mining, transit, communications, education, health and environment industries according to the specific laws of each industry.[7]

The local governments have the legal powers to create, modify and eliminate fees, contribution, taxes, licences and municipal rights. They also have the task to regulate local public services they have authority on. In terms of specific industry regulation, they have faculties over education, health, housing, sanitation, and environment, sustainability of natural resources, collective transport, tourism transport, archaeological monuments, culture, leisure, and sport.

It is important to notice that there are some concurrent regulatory faculties between different levels of government, although the national government retains the oversight of all the regulatory system (see Box 2.3 and Chapter 6). This organisation is complex and the regulatory production must be as clear as possible to achieve regulatory coherence. By the same reason, co-ordination across the different layers of government is warranted to complement regulation and avoiding duplications.

### *Regulatory quality in the rule-making process*[8]

General guidelines that all regulatory entities in the public administration must consider when preparing bills and other proposals holding status of law are contained in the Framework Law for Legislative Production and Systematization (LMPSI, *Ley Marco para la Producción y Sistematización Legislativa*). Standard on legal quality and homologation of laws is rather important in the pursuit of regulatory quality (see Box 2.4).

Box 2.4. **The Framework Law for Legislative Production and Systematization of Peru**

The LMPSI establishes guidelines for the composition and publication of laws. This has as an objective the systematisation of the legislation in order to ensure stability and legal certainty (Art. 1). It is responsibility of the Ministry of Justice to systematise legislation, to foster its study and dissemination, as well as to execute or monitor its official edition (Article. 6-h LOPE).

To ensure legal quality, the LMPSI requires every law to have an official label provided by Congress; unless it is a Legislative or Urgent Decree, whose label must be provided by the executive branch (Art. 3). Likewise, the bylaw of the LMPSI provides the specific guidelines for the structuring and drafting of the legislation. It establishes that all laws and projects of

### Box 2.4. **The Framework Law for Legislative Production and Systematization of Peru** (*cont.*)

Legislative and Urgent Decrees mush include an explanation of the purpose of the proposal (*exposición de motivos*), a cost-benefit analysis and an impact analysis on the legislation, among others (Art. 1).

**Explanation of the purpose of the proposal**: every law and legislative project must include the objective of the legislation, as well as the background from which it derives. It also must include a legislative analysis, specifically on the legality of the draft, and its consistency with other laws and international treaties (Art. 2).

**Cost-benefit analysis**: this analysis is compulsory for constitutional projects, organic laws or State laws. It is also mandatory for every law related to social or environmental policies, as well as to any laws related to economic, financial, production or tax issues. This analysis must include a description on the quantitative and qualitative impact that the legislation will have on stakeholders, the society and the general wellbeing; its costs and benefits and the analysis of other alternatives (Art. 3).

**Impact analysis on current legislation:** this section must identify the impact of the project on the current legislation, providing information regarding whether it fills a gap in the legislation or if it amends or repeals current regulation (Art. 4).

*Source:* Framework Law for Legislative Production and Systematization (*Ley Marco para la Producción y Sistematización Legislativa*).

### Box 2.5. **The manual of legislative technique of Peru**

Through examples and explanations, the manual guides the user how to present a legal project. This manual is divided into five chapters:

- *General aspects:* Explains the legal powers of the President to issue regulation with the status of law (legislative and urgency decrees). It also explains the normative faculty of the agencies of the executive branch and the basic principles for the design of a regulatory proposal.
- *Structure and rules:* To ensure legal quality, this manual explains thoroughly each requirement of a regulatory proposal. The chapter presents a wide array of explanations, from the sections that a law must contain, to how to include the references. This chapter focuses on the methodology to build a regulatory project.
- *Regulatory language:* This chapter focus on the style of the drafting, it includes: regulatory style, use of time and verbal modes, basic criteria of drafting, rules of spelling and grammar.
- *Reasoning of the project:* The chapter starts with a presentation on how to conduct an explanatory statement and aspects to be considered on it. It also contains the explanation about what is expected to be included in a Cost-Benefit Analysis and an analysis of the impact of the enforcement of the normative project.
- *Lists of verification.* It includes the three final checklists to assure that the project has the proper content to justify its necessity and viability, the drafting of the regulatory proposal and reasoning quality.

*Source:* Manual on legislative technique (*Guía de Técnica Legislativa para Elaboración de Proyectos Normativos de las Entidades del Poder Ejecutivo*) MINJUS 2013, www.minjus.gob.pe/wp-content/uploads/2014/04/Gu%C3%ADa-de-t%C3%A9cnica-legislativa.pdf (accessed 7 April 2016).

For regulation issued exclusively by the executive branch, there is the manual of legislative technique. The purpose of this guide is to be a reference and a practical manual for the entities in the executive branch to prepare regulatory projects (see Box 2.5 above).

The *Peruvian Competitiveness Agenda 2014-2018* also includes as one of its goal the application of regulatory quality tools in the process of rule-making. This agenda incorporates an integral view of the national competitiveness which is designed thorough eight topics: Business and Productive Development; Science, Technology and Innovation; Internationalisation; Infrastructure, Logistics and Transportation, Information and Communication Technologies, Human Capital, Easiness of Doing Business and Natural and Energy Resources.

The chapter of *Eases of Doing Business* of the Competitiveness Agenda is highly focused on regulatory improvement measures. In particular, Component I "Improvement of the regulation and the supervision processes through the life cycle of the enterprises" of the agenda states as one of its objectives the application of the RIA methodology up to the 100% of the regulations that create or modify procedures related to licences, authorisations and permits.

However, as it is discussed at length in Chapter 3, the requirements of a cost benefit analysis included in both the LMPSI and the manual of legislative technique is seldom met, or the analysis is not technically satisfactory, besides the fact that there is no overnight body to check the quality of the assessment. Similarly, the objective of applying RIA set in the competitiveness agenda has not been met.

Regarding pubic consultation, Supreme Decree No. 001-2009-JUS approves the bylaw that establishes provisions for the advertisement, publication and dissemination of regulatory instruments. According to this bylaw all drafts of regulation must be published at the *Official Gazette,* the official website of the public entity, or in any other communication media, such as institutional magazines (Article 13). This must be done at least 30 days before the schedule date for its entry into force and must allow comments from stakeholders. Exceptions to this rule are any norms whose publication is deemed not necessary or it is going against security or public interest; regulations designed by the Legislative and Judicial Branches, as well as Urgent and Legislative Decrees (Article 14).

As in the case of cost-benefit analysis, there is not an agency within the Peruvian government entrusted with the task of supervising whether this obligation of prior consultation is met, or to check the quality of the consultation process. Chapter 3 discusses in more details these findings.

### *Regulatory quality in the management of the stock of regulations*[9]

Peru has included directly or indirectly the objective of administrative simplification of formalities in several legal and policy documents. The General Law of Administrative Procedure (LPAG, *Ley de Procedimiento Administrativo General*) in its Article IV states that "The established formalities by the administrative authority must be simple, eliminating any unnecessary complexity; that is, information requirements must be rational and proportionate to the objectives to be achieved".

Administrative simplification is one of the most relevant elements in the National Policy of Modernisation of Public Management. The National Policy is an effort to develop a joint strategy across the government to modernise public practices. It was approved in January 2013, and it is based in the Framework Law of the Modernisation of the State Management (LMMGE*, Ley Marco de la Modernización de la Gestión del*

*Estado*). The National Policy includes as some of its objectives the implementation of management processes and the promotion of the administrative simplification on public entities; the promotion of e-government through the intensive use of Information and Communications Technologies (ICT), and the designing of mechanisms for the efficient co-ordination among public entities belonging to the three government branches.

As a result of the National Policy mentioned above, Peru issued the National Plan of Administrative Simplification on February 2013. Its general objective is to improve the quality, efficiency and opportunity of the administrative formalities and procedures. The plan's main specific objectives are:

- Promote the implementation of the administrative simplification processes oriented towards the generation of positive results and impacts for all the citizens;
- Promote the progressive incorporation of the information and communication technologies as a strategy to offer services and formalities of quality; and
- Develop a *Citizen Attention Model* and promote its implementation and strengthen the administrative simplification process.

Despite the existence of an implementation plan for this policy, meaningful results of this policy are yet to be observed, which is explained in part by the limited capacity of the Secretariat of Public Management to enforce compliance of this policy across the Peruvian government. See Chapter 4 for a detailed discussion.

Additional elements of administrative simplification policies are to be found in the Competitiveness National Agenda 2014-2018, whose Component II sets as objective the optimizing the management of the administrative procedures that have a negative impact in the business activities, which comprises the total simplification of prioritised procedures related with private investment, and the implementation of at least two one-stop-shop for formalities of procedures related to investment.

Similarly, the National Plan of Productive Diversification (*Plan Nacional de Diversificación Productiva*) incorporates elements to pursue practices to simplify government formalities. The broad goals of this plan include the achievement of a sustainable economic growth, reducing Peru's dependency on commodities, the improvement of productivity and the promotion of formal and quality employment. As part of its main avenues of work, the plan contains the line of regulatory quality, which is on improving regulations at least in the labour, health and environmental markets.

In addition, the administrative simplification strategy within this plan seeks the optimisation of formalities and the key procedures for the productive activities of Peru. This strategy has four key activities: i) simplify the formalities in charge of the Ministry of Production; ii) identify the opportunities for more proactivity; iii) facilitate the tax payment process; and iv) the systematisation of the information requested by the State.

A salient feature of the policies on the management of stock of regulation in Peru, are the Single Text of Administrative Procedures (TUPA). The TUPA is a tool to standardise the information published by public entities' on procedures, formalities and services. With this tool, the government provides certainty to citizens and businesses on how to comply with information obligations, request services or require information from public entities. To issue TUPAs is an obligation for all agencies of the public administration.[10] Similarly, there is an obligation to publish the TUPAs in the Official Gazette and the institutional websites,[11] or the Journal of Judiciary Notices of the region and province.[12]

The compulsory information in a TUPA includes a detailed description of the obligation to be met, the type of procedure, fees, whether a silent-is-consent rule is applied, the office responsible, and the authorities with faculty to approve the procedures and handle appeals.[13] A TUPA is a relevant foundation to build an administrative simplification policy as it provides with an inventory of information obligation. Nevertheless, this inventory must be consolidated, on a single place for ease of access, and should be reviewed regularly to reduce administrative burdens.

Finally, there are no specific legal provisions or policy statements or plans to carry *ex post* evaluation of regulation. As a result, it is not a standard practice for agencies within the central government of Peru. The main efforts in this area are made by economic regulators and the INDECOPI. The latter, however, pursues only legal coherence of regulations, not a comprehensive impact or results assessment.[14]

## Institutions for regulatory quality in Peru

Mirroring the scattered elements of regulatory quality included across legal and policy instruments in Peru, the institutional landscape of Peru also offers a view in which legal attributions, practices, and efforts on regulatory policy are dispersed across several agencies, without articulated efforts for co-ordination, with some specific exceptions such as the Vice-Ministerial Coordinating Council.

### *The MEF, the General Directorate of International Economy, Competition, and Productivity Affairs, and the General Directorate for Investment Policy*

Inside the MEF, there is the General Directorate of International Economy, Competition and Productivity Affairs (DGAECYP, *Dirección General de Economía Internacional, Competencia y Productividad*), which belongs to the Vice-Ministry of Economy (*Viceministerio de Economia*). This office is one of the most active in topics related with regulatory quality and has two areas: the Directorate of International Economy Affairs and the Directorate of Normative Efficiency for the Productivity and Competition. The legal attributions of each directorate regarding regulatory policy include.[15]

#### *Directorate for International Trade Affairs*

- Analyse and give opinions regarding the provisions or obligations established by formalities which can affect domestic and international free trade of goods and services, such as tariffs, competition barriers or practices of competition surveillance;
- Propose and follow up policies and regulation oriented towards trade issues (subsidies and dumping);
- Participate in the design and implementation of economic and trade integration strategy; and
- Define the strategy and lead the negotiations of international agreements and treaties on private investment and financial services.

*Directorate of Regulatory Efficiency for the Productivity and Competition*

- Support the design and the implementation of policies and activities towards the development of areas such as education, labour markets, regional development, environment, institutional consolidation and technological innovation;
- Propose measures to improve the processes of expeditions of legal instruments;
- Propose measures to promote free competition, and
- Propose and supervise policies and regulation regarding public procurement.

As it is discussed in detail in Chapter 3, the DGAECYP in practice has taken the unofficial role of checking the quality of the impact assessment or the cost-benefit analysis of draft regulation, to the extent that these draft regulations have a crosscutting impact across the economy or impact on national or international commerce, without having a proper mandate in this sense. The also check for policy coherence of the new proposal against other public policy priorities. Nevertheless, this activity is not done in a systematic way, nor does the DGAECYP have sufficient powers to return the draft regulation in demand of higher quality.

### *The General Directorate for Investment Policy of the MEF*

This office is in charge to design guidelines for public and private investment and for tracking the obstacles that these investments may suffer from public sector practices. In practice it may work as a manager to facilitate the compliance of regulatory processes for both public and private enterprises. In this sense, its work is highly related to regulatory quality, as its goal is to reduce regulatory burdens. In practice it has two mainstream functions: it studies the needs of the investors and continuously analyses the regulatory framework to seek areas of improvements. Specific tasks of this area include:

- Design and propose guidelines and strategies to promote private investment projects;
- Evaluate investment projects declaring its viability with regard to the actual regulation;
- Propose guidelines and measures which optimises the economic context of public investment to align the projects in track with the strategic goals.

### *The PCM*

According to the regulatory framework, the PCM has functions on regulatory quality. The government modernisation process is to be developed by the executive branch through the General Direction of State Management of the PCM.[16] Accordingly, it is the responsibility of the PCM to co-ordinate the multi-sectorial national policies, as well as to execute the national policies of modernisation of the public administration, among others.[17] From this mandate the administrative simplification efforts derive. Specifically the entity responsible for co-ordinating and directing the process of modernisation of public administration is the Secretariat of Public Management, as it directly depends on the General Secretary of the PCM.[18]

An additional relevant obligation of the PCM is to "Promote the social participation and consultation and to co-ordinate with social instances over issues regarding national interests".[19] This is a relevant legal foundation over public consultation.

### *The Vice-ministerial Coordinating Council (CCV)*

The Vice-Ministerial Coordinating Council (CCV, *Consejo de Coordinación Viceministerial*) is a body in which multi-sectorial regulation is analysed and approved.[20] The CCV is comprised by the vice-ministers of the central government and the General Secretary of the Presidency of the Council who chairs the meetings. The CCV has three main tasks:[21]

1. Review Law Projects, Legislative Decree Projects, Urgency Decree Projects, Supreme Decree Projects and Supreme Resolution Projects that either require the approving vote of the Council of Ministers or are related to multiple sectors
2. Facilitate the generation of input and recommendations in response to reports on multi-sectorial themes that are of high national interest or that affect the general policy of the government
3. Approve the CCV rules of procedure

According to the PCM, the CCV holds a standardised procedure with the help of ICT tools for the process of reviewing regulation. The process starts on Monday when the Coordination Secretariat of the PCM organises a tentative agenda for the week's meeting. After receiving and integrating the proposals from the ministries, the Premier decides what is to be included in the agenda and an invitation is sent for the weekly voting meeting to be held on Thursday. Before the meeting, the 35 vice-ministers have until Wednesday to upload in the digital platform the observations, comments and corresponding documentation. The possible range of status of the drafts regulatory instruments after the assessment of the CCV is the following:

- Viable without observations;
- Viable with observations;
- Not viable, and
- Viable with comments.

The matters considered as comments are those regarding grammatical and formatting aspects such as commas, numerals, etc. The observations on the other hands contain discussion about the substance of the regulatory projects. When comments arise, they are easily dealt with during the meeting on Thursday. In contrast, the observations have to be thoroughly discussed and they often cause the regulation to stall in the CCV. The voting is generally delivered physically during the meetings, although the CCV's digital platform can be used by the vice-ministries who are not able to attend the meetings.

### *The Secretariat of Public Management*

Within the PCM, the Secretariat of Public Management (SGP) works as a technical unit with focus on the modernisation of public management practices in Peru. In the specific context of regulatory policy, the SGP is in charge of providing assistance in matters of administrative simplification, as well as to evaluate administrative simplification processes related to the TUPAs. The SGP has also the duty to issue directives and guidelines, as well as the legal power to request any information from other ministries on administrative simplification issues.[22]

The role of the SGP has proven quite active in the TUPA publication and update. This unit designs and publishes the TUPA models for specific regulations that have to be used by entities. The goal of this practice is to reduce the administrative burdens and to homologate regulatory requisites throughout different localities.

### *The MINJUS and the General Directorate of Legal Framework and Development*

The General Directorate of Legal Framework and Development (DGDOJ, *Dirección General de Desarrollo y Ordenamiento Jurídco*) is the office within MINJUS in charge of legal co-ordination within the executive branch. This office has the utmost goal of assuring legal quality among the government. In terms of providing legal advice to the public sector entities it has three conventional lines of legal advice:[23] 1) issue decisive opinions when two or more offices of government have disagreements in the application, interpretation or scope of the regulation; 2) issue legal reports about the scope of regulations, and 3) issue consultation when the legal nature of a certain regulation seems diffuse. Furthermore, it has some specific activities aligned with the nature of regulatory policy:

- Detect voids and deficiencies in the legal framework and elaborate drafts of codes, laws and regulations to improve the legal instrument;
- Systematise the legal instruments and the electronic support for the national legislation. The LMPSL obliges public entities in Peru to adopt regulatory quality tools such as the *Cost-Benefit Analysis* and the analysis of the impact of the national legislation;
- Disseminate the national legislation according to the regulatory framework.[24] Some important aspects include the official publication of all legislative instruments in the Official Peruvian Gazette, as a necessary condition for its enactment;
- Issue legal reports on regulatory projects when a public entity requires it, and
- Propose the creation of commissions for the preparation, reform, revision or update of legislation.

### *The National Institute for the Defence of Competition and Protection of Intellectual Property (INDECOPI)*

The INDECOPI is an administrative independent body assigned to the PCM. The core of its public policy nature is to address competition and intellectual property issues. Nonetheless, this body is also one of the main actors in terms of regulatory quality in Peru. Through the Commission of Elimination of Bureaucratic Barriers (CEBB, *Comisión de Eliminación de Barreras Burocráticas,*) of INDECOPI, the Peruvian government strives to eliminate existing regulation that lacks reasonability or legality. In this sense, the CEBB follows principles of administrative simplification and a form of *ex post* evaluation of regulation.

Bureaucratic barriers are understood as regulation that hinders illegally or unreasonably the access or permanency of economic agents in the market, in particular small enterprises. The CEBB works in two modalities to eliminate bureaucratic barriers: office investigations and complains from affected parties, the latter is the most common practice (see Box 2.6).

### Box 2.6. **Process for the elimination of bureaucratic barriers**

The process of elimination of administrative burdens can be started through a complaint or from an official investigation carried out by the CEBB.

**Complaint process**

1. A formal complaint from a citizen: this should be presented as a written request to INDECOPI's Technical Secretary
2. Admissibility test: the Technical Secretary or the Commission reviews the complaint to assess if it is admissible. At this point, it can also request additional evidence to the citizen.
3. Approval of complaint admission: the Technical Secretary or the Commission issues the resolution admitting the complaint
4. Notification: the Technical Secretary notifies the public agency that it is being investigated, which has 5 days to reply. The submission of evidence can be delayed for up to 15 additional days, once the original period of 5 days has finished.
5. Submission of evidence: the public agency under investigation sends evidence to justify its actions. Some public agencies do not reach this step. The reason is that they prefer to eliminate the obligation to avoid any possible fine.
6. Conciliatory hearing: the Technical Secretary can summon the public agency and the citizen to a conciliatory hearing. The process ends if both parties reach an agreement. The Technical Secretary can then continue with the elimination of the obligation through an official investigation.
7. Final resolution: the Technical Secretary prepares the final resolution and presents it to the Commission. In turn the Commission may fine the entity and eliminate the obligation for the citizen.

**Official investigation process**

1. An official investigation: the Commission or the Technical Secretary decides to carry an investigation.
2. Review of the official investigation report: the Commission or the Technical Secretary review the investigation report in order to determine if there is evidence of a bureaucratic barrier.
3. Beginning of official investigation: The Technical Secretary or the Commission issues the resolution of the admission of the complaint admissibility or the starting of the official investigation
4. Notification: the Technical Secretary notifies the public agency that is being investigated, which has 5 days to reply. The submission of evidence can be delayed for up to 15 additional days, once the original period of 5 days has finished.
5. Submission of evidence: the public agency under investigation sends evidence to justify its actions. Some public agencies do not reach this step. The reason is that they prefer to eliminate the obligation to avoid any possible fine.
6. Final resolution: the Technical Secretary prepares the final resolution and presents it to the Commission. In turn the Commission may fine the entity and eliminate the obligation for the citizen.
7. The case is sent to the Citizen's watchdog (*Defensoría del Pueblo*) because INDECOPI has no legal powers to make the removal of the obligation binding. As a result, INDECOPI may file a claim for unconstitutionality to the Citizen's watchdog.

*Source:* Legislative Decree No. 807: Faculties, rules and organisation of INDECOPI.

The agency applying a regulation that the CEBB considers to be excessive or illegal may receive a sanction under the following scenarios:

- When the mandate of inapplicability or elimination of a bureaucratic barrier is not complied with.
- When tax restrictions are applied to the free transit of goods or services.
- When a procedure initiated by a citizens refers to a regulation being previously considered illegal or unreasonably.
- When a procedure is consider illegal due to the following reasons: i) the obligation is above the law; ii) demand of fees above the amount published in the TUPA; iii) fail to comply with the information set in the TUPA; iv) establish longer response times for licences, permits, authorisations or formalities of similar nature than the ones set in the legal framework; v) demand documentation or information prohibited by the Law of General Administrative Procedures.

## Assessment

***Peru lacks an articulated whole-of-government regulatory policy, despite having many elements that could be part of this policy***

The central Peruvian government has several institutions in place, as well as several public policies, which aim at improving the quality of regulations. For instance, the PCM is in charge of the policy on national modernisation which includes administrative simplification, with several ongoing strategies, such as the establishment of the TUPAs for ministries and agencies of all levels of government. Also, the INDECOPI, via the Commission for the Elimination of Bureaucratic Barriers reviews formalities. The Ministry of Justice has issued a manual of legislative technique which provides ministries and agencies with guidance on how to draft a piece of regulation from a legal quality point of view. Similarly, there is the legal obligation for all ministries and agencies of the central government to perform a cost-benefit analysis for almost all new draft regulation, although no mechanism exist to enforce this obligation. More examples have been found of policies and practices directed at promoting and enhancing the quality of regulation.

However, these efforts are not articulated within a single policy instrument, such as a law or a programme. Neither there are institutions that co-ordinate the different efforts such as a ministry, committee, or dedicated body, which could assess the overall performance, results and benefits of their individual impact. Moreover, the Peruvian government has not issued a specific policy statement recognizing regulatory policy objectives as an element of a broader public governance and competitiveness strategy of the government, which could serve as a guiding axis for all the individual efforts. As a result, the full benefits of an articulated whole-of-government regulatory policy are not being acquired by the Peruvian government.

***All the efforts and strategies on regulatory policies are scattered across ministries and agencies, or across offices within a given ministry. Moreover, the salient feature of these arrangements is the lack of oversight***

Three ministries concentrate most of the functions and activities that pertain to regulatory policy: The MEF, the PCM, and the MINJUS. In the first two cases, the responsibilities on regulatory quality are spread amongst several offices, which include the INDECOPI, the CCV and the Secretariat of Public Management, for the case of the Presidency of the Council of Ministers; and the DGAECYP, the General Directorate for Investment Policy, amongst others, for the case of the MEF. This mosaic of agencies, offices and responsibilities can deter any effort to define and enforce an articulated whole-of-government regulatory policy.

Additionally, within their own responsibilities, these agencies and offices have, in the best of cases, limited capabilities to enforce the obligations on regulatory policy to the ministries and agencies issuing and applying the regulation, and in other cases, they have no enforcement capabilities whatsoever. For instance, the obligation of preparing *ex ante* cost-benefit analysis for draft regulation is not supervised, and unless the draft regulation goes through the CCV, which applies only in cases of multi sector regulation, the analysis is not done; and even in the cases in which the draft regulation is discussed within the CCV, no proper assessment of the quality of the *ex ante* cost benefit analysis is performed.

The weak oversight of regulatory policy owes its existence to two main reasons: i) inadequate or inexistent legal framework – i.e. no oversight functions have been established; and ii) lack of capacity in terms of human and financial resources. As a result, ministries and other regulating entities have little incentive to comply with their regulatory quality responsibilities.

## Key recommendations

- Peru should consider issuing a policy statement on regulatory policy with clear objectives, and considering including this statement as part of a law or another legal document with binding capabilities (see Box 2.7). This statement should contain all the specific strategies and tools to manage effectively the whole regulatory governance cycle: *ex ante* evaluation of draft regulation including the promotion of regulation based on evidence; consultation and stakeholder engagement; administrative simplification and review of the stock of regulation, including *ex post* evaluation; policy on inspections and enforcement, and forward planning.

Box 2.7. **Adoption of an explicit regulatory policy across OECD countries**

An explicit regulatory policy sets the ground for a profound regulatory reform. The first Recommendation of the Council on Regulatory Policy and Governance urges OECD countries to: commit at the highest political level to an explicit whole-of-government policy for regulatory quality. The policy should have clear objectives and frameworks for implementation to ensure that, if regulation is used, the economic, social and environmental benefits justify the costs, the distributional effects are considered and the net benefits are maximised.

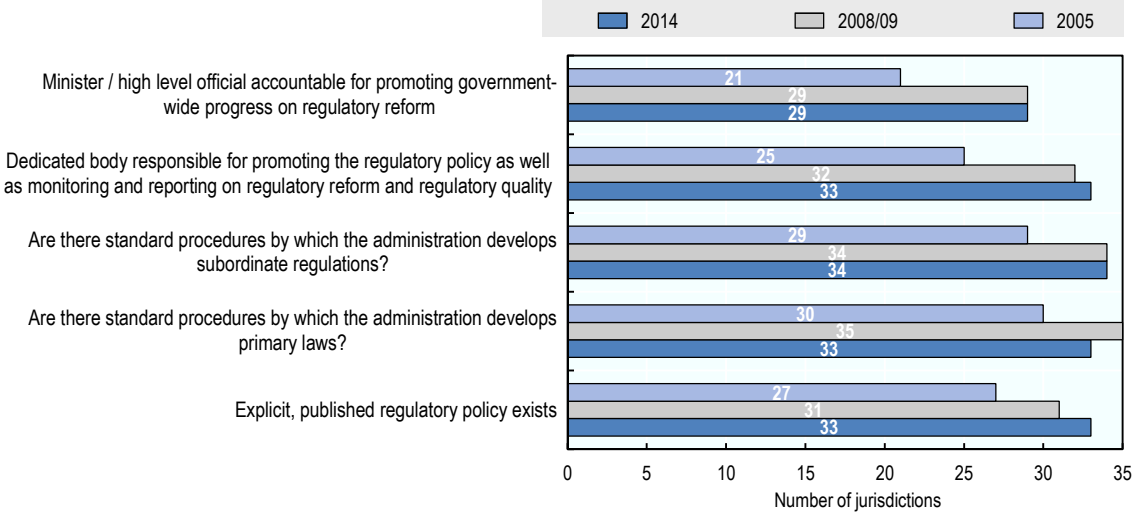
### Box 2.7. **Adoption of an explicit regulatory policy across OECD countries** (*cont.*)

The survey results of the OECD *Regulatory Policy Outlook 2015* confirm that most countries show signs of such a commitment. An increasing number of countries have nominated a minister or a high-level official to be accountable for promoting government-wide progress on regulatory reform; and have developed and published an explicit regulatory policy. Most countries have also established a dedicated body responsible for promoting regulatory policy and for monitoring and reporting on regulatory reform and quality. In practice, most countries have standard procedures for developing primary and subordinate laws (Figure 2.3).

This high-level of commitment is encouraging. It shows that OECD countries have established the conditions for implementing the 2012 Recommendation: developing an explicit policy and making it widely known, securing high-level political leadership and advocacy with government; and establishing de facto procedures. The survey results also raise the issue of the small number of OECD countries that still do not have an explicit regulatory policy. There are also countries that no longer report having some of the major requirements for regulatory quality that they had reported in 2008/09. On the whole, however, the survey data show evidence of stalling rather than backsliding.

*Source:* OECD (2015), *Regulatory Policy Outlook 2015*, OECD Publishing, Paris, http://dx.doi.org/10.1787/9789264238770-en.

Figure 2.3. **The adoption of an explicit whole-of-government policy for regulatory quality**




*Notes:* Based on data from 34 countries and the European Commission. Chile, Estonia, Israel and Slovenia were not members of the OECD in 2005 and so were not included in that year's survey.

*Source*: OECD (2015), 2014 Regulatory Indicators Survey results, www.oecd.org/gov/regulatory-policy/measuring-regulatory-performance.htm.

- Peru should aspire at establishing an oversight body which concentrates, if not all, most of the regulatory policy activities and tools currently spread across several ministries, agencies and offices. This oversight body should have the legal capability and the necessary resources to carry out an active enforcement of activities, while overseeing the whole regulatory policy, including the capacity to return draft regulation with a proper assessment through the use of Regulatory Impact Assessment (RIA), when the defined criteria is not met.

### Box 2.8. **Adoption of an oversight body across OECD countries**

The 2012 Recommendation of the Council on Regulatory Policy and Governance recommends that countries should "establish mechanisms and institutions to actively provide oversight of regulatory policy procedures and goals, support and implement regulatory policy and thereby foster regulatory quality. The specific institutional solution must be adapted to each system of governance".

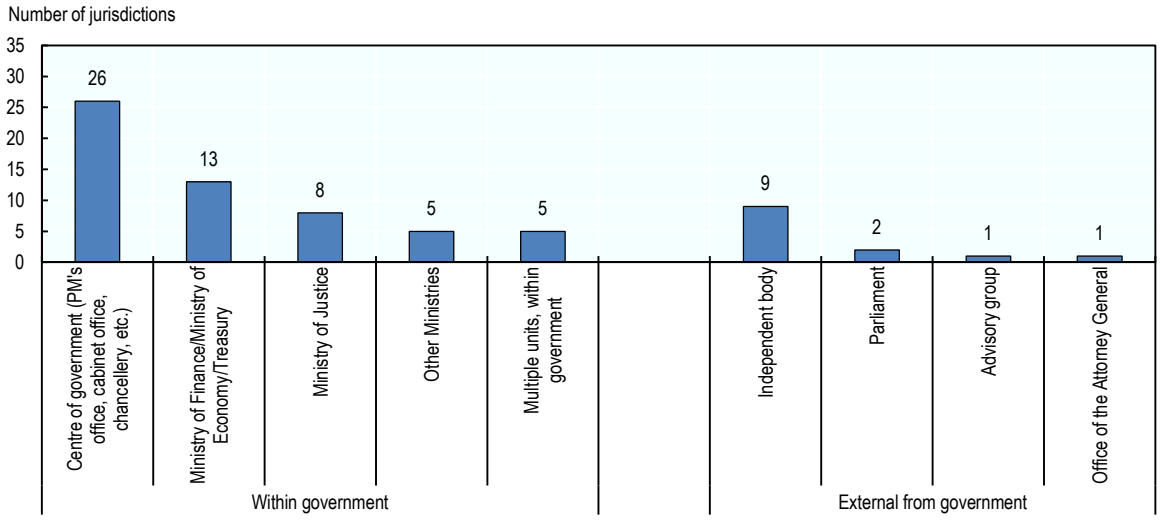
According to the 2014 Regulatory Indicators Survey, there is a heterogeneous institutional setting of oversight bodies across OECD countries. For instance, there is a variation in the number of oversight bodies within the government on each country. The study found that 33 of the 35 surveyed countries have instituted either single or multiple oversight bodies to ensure regulatory quality, with an average of 2.8 per country. This shows compliance with the previously mention recommendation but requires intergovernmental co-ordination among the various oversight bodies to maintain a whole-of-government approach.

Additionally, the Council recommends that "a standing body charged with regulatory oversight should be established close to the centre of government (…)". In this regard, the Survey found that a majority of countries (26 out of 35) have at least one oversight body located at the centre of government (e.g. the prime minister's office or cabinet office, see Figure 2.4), but they can also be found in the Ministry of Economy, Finance or Business, the Ministry of Justice, and recently, independent oversight bodies have been created. The location of these institutions should vary according to the focus and nature of their work.

Likewise, the recommendation states that "the regulatory oversight body should be tasked with a variety of functions or tasks in order to promote high-quality evidence-based decision making (…)", these responsibilities range from RIA, administrative simplification, stakeholders engagement, *ex post* analysis, legal quality and others. The Survey results show substantial variety across countries in relation to the oversight functions and responsibilities of the oversight bodies. For instance, four bodies enjoy responsibilities for all categories while 35 bodies are limited to one regulatory oversight activity.

*Source:* OECD (2015) *Regulatory Policy Outlook 2015*, OECD Publishing, Paris, http://dx.doi.org/10.1787/9789264238770-en.

Figure 2.4. **The location of oversight bodies**




*Note*: Based on data from 34 countries and the European Commission.

*Source*: 2014 Regulatory Indicators Survey results, www.oecd.org/gov/regulatory-policy/measuring-regulatory-performance.htm.

- As a first step, Peru could consider establishing a co-ordinating council on regulatory policy in which the Ministry of Economics and Finance, the Presidency of the Council of Ministers, and the Ministry of Justice have permanent seats, and with sufficient capabilities to exercise an effective oversight function. Responsibilities and roles for each of these members would have to be defined clearly for the functioning of this council.
- Ideally the policy statement which the first paragraph refers to should include the creation of the oversight body and its functions and responsibilities, and as a transitory strategy, the creation of the co-ordinating council. The practices presented in this report identify approaches to implement accountability, transparency and co-ordination and help identify some lessons that can help guide how these principles are translated into practice.

# Notes

1. Article 15 of the Organic Law of the Executive Branch (LOPE).
2. Article 17 of the LOPE.
3. Article 33, LOPE.
4. SUNASS was created by the Law Decree No. 25965 of December 19th, 1992; OSIPTEL by the Legislative Decree No. 702 of July 11th, 1991; OSINERGMIN by the Law No. 26734 of December 31st, 1996; and OSITRAN by Law No. 26917 of 23 January 1998.
5. See Chapter 7 for the description and assessment of the governance arrangements of economic regulators.
6. See Chapter 6 for a description and assessment of the multilevel regulatory governance in Peru.
7. Art 192. Political Constitution of Peru.
8. See Chapter 3 for a detailed description and assessment of practices of *ex ante* assessment and public consultation of regulation in Peru.
9. See Chapter 4 for a detailed description and assessment of administrative simplification policies and management of the stock of regulation in Peru.
10. Article 1, LGPA.
11. Article 38.4, LPGA.
12. Article 38.3, LPGA.
13. Article 37 of LPGA.
14. See next section and Chapter 4 for more detailed discussion of INDECOPI.
15. Article 139 to 143 of the Supreme Decree Nº 117-2014-EF which approves the internal regulation of organisations and functions of the MEF.
16. Article 1.2, LMMGE.
17. Article 19, LOPE.
18. Rule of procedures for the organisation and functions of the Presidency of the Council of Ministers, Supreme Decree No. 063-2007-PCM.
19. Article 18.7, LOPE.
20. Art. 1.3 of the Ministerial Resolution No. 251-2013-PCM: General Rules of the Vice-ministerial Co-ordination Council (*Reglas Generales de la Comisión de Coordinación Viceministerial*).
21. Art. 4. Ibid.

22. Article 37.7, Supreme Decree that approves the Rules of Procedures and Organization of the Presidency of Council of Ministers (*Decreto Supremo que aprueba el Reglamento de Organización y Funciones de la Presidencia del Consejo de Ministros*).

23. Rules of Organization and Functions of the Ministry of Justice and Human Rights.

24. Supreme Decree No. 001-009-JUS.

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# *Chapter 3*

# *Ex ante* assessment of regulation and public consultation in Peru

*This chapter describes the institutions, legal provisions, and practices of Peru for ex-ante assessment of draft regulation and for consultation with the public. It is found that although some of the building blocks have been set, Peru lacks a full-fledged system for ex ante evaluation of draft regulation, in order to assess whether they provide a net positive benefit to society, and whether they are coherent with other government policies. Peru should introduce a system of ex ante impact assessment. The system would require all regulators to prepare a RIA in order to help them in the development of new regulations. Threshold criteria could be employed to define the depth of the assessment efforts. Consultation should be systematic at the early stages when policy options are being defined and impact assessment is being developed, and once a draft regulation and a draft RIA have been produced.*

Improving the evidence base for regulation through an *ex ante* (prospective) impact assessment of new regulations is one of the most important regulatory tools available to governments. The aim is to improve the design of regulations by assisting policy makers to identify and consider the most efficient and effective regulatory approaches, including the non-regulatory alternatives before they make a decision. Additionally, a process of communication, consultation and engagement which allows for public participation of stakeholders in the regulation-making process as well as in the revision of regulations can help governments understand citizens' and other stakeholders' needs and improve trust in government. This chapter addresses Peru's practices in *ex ante* assessment of regulation, and discusses the actions that Peru undertakes to engage with stakeholder in the process of rulemaking.

## Description of the state of play and current practices in Peru

This section describes the institutions and processes currently involved in the development of new regulations in Peru. In particular, it discusses regulatory decision-making procedures in the executive and the legislative, and the use of *ex ante* impact assessment, public consultation, and other existing mechanisms employed to ensure regulatory quality overall.

Peru is a decentralised unitary State with three branches – legislative, executive and judicial – and three levels of government – national or central, regional and local or municipal. The executive branch is headed by the President of the Republic and comprises the Cabinet, which consists of Ministers appointed by the President of the Republic; the Presidency of the Council of Ministers (PCM) which is held by the President of the PCM; Ministries; and other public entities such as regulatory organisations, commissions and state owned enterprises, among others. The executive branch is elected for a period of five years, while the regional and local governments for periods of four years.

The legislative in Peru is made up of only one chamber: the Congress, which has 130 members elected for 5-year terms.

Under the Political Constitution of 1993, both the legislative and executive, including all three levels of government, have regulatory functions and may therefore develop and issue new regulations.

According to the Peruvian legal system there are different types and sources of regulations. Table 3.1 illustrates the hierarchy of regulations in Peru.

The process of developing laws and regulations in Peru has a complex structure that is better apprehended if analysed according to the source of the regulation. Accordingly, this chapter focuses on the existing processes in Congress (legislative) and in the national government (executive), except for independent economic regulators whose regulatory practices are dealt with in Chapter 7. Regulatory processes at the regional and local levels (subnational) are analysed in Chapter 8.

Table 3.1. **The hierarchy of regulations in Peru**

| Level | Legal rule | Source |
|---|---|---|
| Foremost positive rule | Political Constitution | Congress and Referendum |
| Rules with law-like status | Laws | Congress |
| | Legislative resolution | Congress |
| | Legislative decree | Congress |
| | Emergency decree | Congress |
| | Regional ordinance | Region |
| | Municipal ordinance | Local |
| Rules with by-law status | Supreme decree | Executive |
| | Ministerial resolution | Executive |
| | Regional decree | Region |
| | Municipal edict | Local |
| Rules of particular nature | Supreme resolution | Executive |
| | Regional resolutions | Region |
| | Municipal resolutions | Local |

## Rule-making process in the executive

In Peru, the national government is the most important source of new regulations in terms of the number of regulations issued. Articles 118 and 125 of the Political Constitution set forth the regulatory powers of the President of the Republic and the Council of Ministers. In particular, the latter has the authority to approve bills (draft laws) that the President submits to Congress, as well as legislative decrees, emergency decrees, and other decrees and resolutions as established by law.

In accordance with Article 6 of the Law No. 29158, Organic Law of the Executive Branch (LOPE), the following are functions of the executive branch:

- Issue subordinate regulations, evaluate their implementation and monitor compliance
- Plan, regulate, direct, implement and evaluate national and sectoral policies in accordance with State policies
- Establish relationships, seek consensus, provide technical assistance and develop mechanisms for co-operation with all public administration entities
- Co-ordinate with regional and local governments, with emphasis on shared competences
- Other functions as may be assigned by law

Under special circumstances, the executive may issue regulations fully holding status of law such as legislative decrees and emergency decrees.[1] However, most regulations are subordinate regulations such as supreme decrees,[2] supreme resolutions, ministerial resolutions, directorate resolutions, amongst others.

The process for issuing new regulations at the national level is not framed by a whole-of-government regulatory policy. There are, however, a number of elements that serve as guiding principles for all regulators when issuing regulation.

In particular, the Law No. 26889 Framework Law for Legislative Production and Systematization[3] sets some general guidelines that all regulatory entities in the public administration must consider when preparing bills and other proposals holding status of law. The Framework Law for example regulates the nomenclature, the consistency of the texts (titles, articles, etc.) and the management of errata. It also requires all legislative proposals to have an explanation of the purpose of the proposal providing the rationale behind it (*exposición de motivos*).

The *Reglamento* of the Law No. 26889 (Framework Law regulation or by-law)[4] further details the contents of the *exposición de motivos* (description of motivation for issuing the regulation), which should include the information of any technical reports checked. The *Reglamento* of the law also requires draft proposals to include a cost-benefit analysis (Article 3), and an analysis of the impact of the proposal on national legislation (Article 4).

The Law No. 27444 General Administrative Procedure Law sets important rules regarding public consultation, requiring that a "period of public information" is opened by public authorities, in particular before the approval of any administrative norm that affects citizen's rights or interests.[5] In line with this, the LOPE requires that draft proposals of subordinate regulations (*Reglamentos*) must be published for no less than 5 working days in the website of the sponsoring agency.[6]

Other important efforts to lay down a common framework for all public entities regarding the preparation and communication of draft regulations include a couple of instruments issued by the MINJUS:

- The *Reglamento* that regulates the publicity, the publication of regulatory proposals and the dissemination of regulations,[7] which requires all draft proposals from the executive – except for legislative and emergency decrees – to be publicly available for a period of at least 30 days before their expected date of entry into force.
- The manual of legislative technique which provides ministries and agencies with guidance on how to draft a piece of regulation from a legal quality point of view.[8]

Based on these general guiding principles, the process for issuing new regulations follows in practice two different paths depending on whether the matter to be regulated is of the exclusive competence of the sponsoring agency or whether the regulation overlaps with legal competence of several agencies.

When the competence is exclusive of the sponsoring agency or of a maximum of two agencies, the process in general terms is as follows:

1. The technical areas of the sponsoring ministry or agency prepare a draft proposal, the description of motivation, and the cost-benefit analysis. In some cases, working groups with staff from different areas of the agency are set up for this purpose.
2. The legal department of the sponsoring ministry or agency reviews the draft proposal, and, if applicable, prepares the impact of the proposal on national legislation.
3. The draft proposal may be published on the website of the ministry or agency for public consultation.

4. Once the proposal is ready, it is sent to the minister or head of the regulatory agency for approval and signature. In the case of ministries, previous approval from the relevant vice-minister is also required.
5. If the proposal requires the signature of the President of the Republic, it is sent to the office of the President where it is reviewed and signed.
6. The proposal is published in the official gazette "El Peruano".

The process described often shows wide variations depending on the type of proposal under consideration – for example, a proper cost-benefit analysis, i.e. Step 1 above, is not prepared for all subordinate regulations – and on practices from each ministry or agencies, which are normally based on tradition and administrative uses.

These practices vary greatly not only across entities but also within different regulatory areas within an agency or ministry. As a result, some entities such as the MEF have tried to systematise the way the different areas of this ministry prepare draft regulations, which have to produce a "normative impact report".[9] The Ministry of Health has similar internal regulations.[10]

In the case of draft regulations which require the approval of three or more ministries, the process follows a different path. Once the draft regulation has the approval of the ministers or heads of the regulatory agencies involved in the drafting process, i.e. Step 5 above, the proposal is sent to the PCM to be discussed by the Vice-ministerial Coordinating Council (CCV) before signature by the President of the Republic, or if required its adoption by the Council of Ministers, enactment and implementation.

As part of its task to co-ordinate multi-sectoral policy issues from a technical stance, the CCV is in charge of reviewing and discussing multi-sectoral regulatory proposals.[11] At this stage all 35 vice-ministries participating may raise substantive or formality issues, and the proposed draft regulation will not be adopted until all issues have been cleared, that's until all members reach a consensus.

During the CCV stage, three institutions perform an important and systematic supervisory or oversight function. The MEF carries out an analysis of the proposed regulation both in terms of the budgetary impact and in terms of the economic impact (benefit-cost analysis). The MINJUS carries out an analysis of the constitutionality and legality of the proposal and in terms of its legal quality, based on the Law on Organisation and Functions of the Ministry of Justice, its by-law, and on the manual of legislative technique. The PCM assesses whether the proposal is consistent with guidelines on administrative simplification, and with the organisation and functioning of the government.

Once all the observations have been discussed and agreed upon, it either goes to the Council of Ministers for a prior approval before being passed to the President, or directly to the President for his signature, and then it is published in the official gazette "El Peruano".

## The legislative process

The legislative process is framed by both the Political Constitution and the Congress Regulations (*Reglamento del Congreso*). According to Article 102 of the Constitution, the functions of the Congress include issuing laws and legislative resolutions. This authority

may be only delegated to the Congress Standing Committee with the limitations set forth under Section 4 of Article 101 of the Constitution.

There are different types of laws (constitutional development laws, organic laws and ordinary laws, etc.) but they all follow the same general legislative process,[12] which is regulated by Articles 72 through 81 of Congress Regulations.

According to Article 73 of Congress Regulations, the legislative process for the approval of laws and legislative resolutions has six stages as a minimum:

1. Legislative initiative[13]
2. Study in committees
3. Publication of Committee opinion on the Congress website, the Congress gazette or in the official gazette "El Peruano"
4. Bill debate in Plenary Sessions of Congress
5. Approval by double vote
6. Enactment

Article 75 of Congress Regulations sets the requirements of legislative proposals. In particular it requires that all proposals must be accompanied by: i) a description of motivation for issuing the regulation (*exposición de motivos*), ii) an analysis of the effect of the proposed regulation on the national legislation, and iii) a cost-benefit analysis of the future regulation including, if needed, a comment on any environmental impact, among other requirements.

After verifying that the legislative proposal meets all formal requirements, it is published on the Congress website, and is sent to one or two committees for assessment and opinion. Committees have a maximum period of 30 business days to issue their opinion, although in practice the assessment takes longer.

The assessment and opinion from the committee(s) must be published on the Congress website, the Congress gazette or in the official gazette "El Peruano", at least seven calendar days before its debate in a Plenary Session of Congress.[14]

After being debated and voted twice, if the proposal is approved it is sent to the President of the Republic who has a period of 15 days to either sign it into law or present observations. If none of the above happens within that period, the President of Congress may sign the bill, which will then be enacted.

All this process is supported by different technical tools such as the Manual of Legislative Technique and the Manual of Legislative Process issued by Congress, which aim at guiding and clarifying the different procedures involved in the general process and improving the quality of new regulations issued from the legislative.

## Benchmarking

This section benchmarks Peru's practices for developing new regulations against OECD principles and international best practice. It highlights existing good practices but focuses on the gaps and the main issues to be addressed, in order to improve the rule-making process and in particular *ex ante* evaluation of draft regulations in Peru.

Regulatory policy makes use of different tools and processes to improve the quality and efficiency of new regulations. Together they work as "filters" to safeguard the quality of regulations before they take effect. Two essential tools for the development of new regulations are Regulatory Impact Analysis and Regulatory Transparency.

### *Regulatory impact analysis*

Improving the evidence base for regulation through an *ex ante* (prospective) impact assessment of new regulations is one of the most important regulatory tools available to governments. The aim is to improve the design of regulations by assisting policy makers to identify and consider the most efficient and effective regulatory approaches, including the non-regulatory alternatives before they make a decision. RIA helps achieving this objective through the analysis and measurement of likely benefits, costs and effects of new regulations, and thus represents a core tool for ensuring the quality of new regulations through an evidence-based process for decision making (OECD 2015).

In Peru there is no explicit policy or requirement to undertake RIA as part of the regulatory making process. There are however some requirements, which are applicable to legislative-level (bills, and legislative and emergency decrees) and subordinate regulatory proposals (supreme decrees) that taken together could be seen as an *ex ante* assessment of regulatory proposals. They are:

- Description of motivation for issuing the regulation (*exposición de motivos*)[15]
- Cost-benefit analysis[16]
- Analysis of the impact of the proposed regulation on national legislation[17]

#### *Description of motivation for issuing the regulation (exposición de motivos)*

This requirement consists of an explanatory document providing the legal basis that justifies the need for the regulatory proposal, with an explanation of the most relevant aspects and a summary of pertinent background information. The legal foundation must include an analysis on the constitutionality and legality of the proposed initiative, in addition to its consistency with all other laws in the national legal system and with the obligations contained in international agreements ratified by the Peruvian State. This document is normally prepared by the department of the ministry or agency in charge of the draft proposal and it is normally drafted at the end, i.e. once the regulatory proposal has been drafted. The description tends to be short, very general and a sort of justification from a legal point of view of the decision made, emphasizing only the benefits, rather than a real analysis of the causes of the underlying problem to be solved or the rationale that gives rise to the proposed legislation.

#### *Cost-benefit analysis*

The objective of this requirement is to serve as a method of analysis in order to know in quantitative terms the impacts and effects that a regulatory proposal may have upon a series of different variables that affect stakeholders, society and overall well-being, so as to quantify the costs and benefits or at least make it possible to analytically assess the unquantifiable costs and benefits. The need for the regulation must be appropriately justified in light of the nature of the problems, the likely costs and benefits, and any alternative mechanisms to resolve them. It is worth noting how the spirit of this requirement is similar to that pursued by RIA.

As to the scope of this requirement, according to Article 3.2 of the *Reglamento* of the Law 26889, the cost-benefit analysis is mandatory for legislative proposals (bills) associated with constitutional development, organic laws or State reforms; laws which have an impact on economic, financial, productive or taxation aspects; and laws related to social and environmental policy. All other proposals, including non-legislative ones, which do not fall into any of the abovementioned categories, should identify the effects, implications and their consequences, identifying the potential beneficiaries and affected parties in a clear and simple manner. In other words, there seems to be an implicit distinction between a "full" cost-benefit analysis and a "soft" cost-benefit analysis depending on the nature or field covered by the regulatory proposal. In practice, however, Peruvian authorities include this requirement in almost all regulatory proposals without distinction as there is no specific threshold for the application of the analysis.

In terms of the methodology used for the analysis, the manual of legislative technique from the MINJUS is the only guidance of general application across government that regulatory authorities in the executive have at their disposal. The manual points out and explains the difference between the concepts of "cost" and "expenditure", and it does so because – as the guide acknowledges – most regulatory proposals confuse both terms and use them interchangeably, and as a result include only include a text such as "this regulatory proposal does not create public spending" or "this regulatory proposal does not modify the government budget".[18] There is no provision either defining the analytical scope of the impacts to be measured, which could therefore range from economic and social to environmental; impacts on the budget are treated separately from the benefit-cost analysis.

In addition to the lack of methodological manuals, there are no programmes or initiatives to provide capacity building activities in a systematic way to undertake high-quality cost-benefit analysis or building RIA capacities. There have been isolated efforts on training for RIA, but in an isolated way. This has included a few RIA pilots undertaken by some entities such as the own MEF, the Ministry of Foreign Trade and Tourism (MINCETUR) and the Ministry of Production, amongst others.

Regarding oversight and quality control of the analysis, there is no central institution in charge of systematically checking or reviewing whether the cost-benefit analysis presented along with regulatory proposals complies with minimum standards of quality. The MEF has so far taken a leading role in evaluating cost-benefits of draft regulations. This role has more prominence in the case of draft regulations that go through the CCV, although in other cases of sectorial regulation, the Ministry also issues an opinion whenever the proposal restricts commerce of goods and services internally or internationally. Similarly, the Ministry regularly assesses policies and draft regulations using comparative analysis and benchmarking of good international practices. This specialisation has led to the generation and accumulation of a critical mass of capacities and expertise which should be exploited when implementing and adopting a full-fledged regulatory policy in Peru. In general, the process is founded on the principle of self-assessment by the entities themselves of what should be a good standard and the benefits and costs involved. In this sense, the process could be described as decentralised, where both the project and the process are established and evaluated within the proponent entity.

Finally, with regard to the transparency of the cost-benefit analysis, there is no requirement to actively publish it, although citizens can have access through them by requesting so through provisions of public access to government information.

In practice, the cost-benefit analysis presented by regulatory entities to comply with the requirement is not properly developed, as in general it does not evaluate different alternatives or approaches to solving the problem at hand nor does it take into account positive and negative impacts on different stakeholders. As reported to the OECD during interview with public officials from several ministries, in most of the cases the "analysis" consists of a sentence stating that "this law does not cause any expenditure to the State" (see Box 3.1 for relevant OECD country examples on the assessment of cost and benefits).

Box 3.1. **Ensuring correct assessment of cost and benefits: Some country examples**

In **Australia** a preliminary assessment determines whether a proposal requires a RIA and helps to identify best practice for the policy process. A RIA is required for all Cabinet submissions. There are three types of RIAs: Long Form, Standard Form and Short Form. Short Form assessments are only available for Cabinet Submissions. Both the Long Form and Standard Form must include, amongst other requirements, a commensurate level of analysis. The Long Form assessment must also include a formal cost-benefit analysis.

In **Canada** for the case of subordinate regulations, when determining whether and how to regulate, departments and agencies are responsible for assessing the benefits and costs of regulatory and non-regulatory measures, including government inaction. This analysis should include quantitative measures and, if it is not possible to quantify benefits and costs, qualitative measures. When assessing options to maximise net benefits, departments are to: identify and assess the potential positive and negative economic, environmental, and social impacts on Canadians, business (including small business), and government of the proposed regulation and its feasible alternatives; and identify how the positive and negative impacts may be distributed across various affected parties, sectors of the economy, and regions of Canada. Treasury Board of Canada Secretariat provides guidance and a challenge function throughout this process.

In **Mexico** RIAs are reviewed by the Federal Regulatory Improvement Commission (COFEMER) and if they are unsatisfactory, for example, by not providing specific impacts, COFEMER can request the RIA to be modified, corrected or completed with more information. If the amended RIA is still unsatisfactory, COFEMER can ask the lead ministry to hire an independent expert to evaluates the impact and the regulator cannot issue the regulation until COFEMER's final opinion.

In the **United States**, for the case of subordinate regulation, agency compliance with cost-benefit analysis is ensured through review of the draft RIA and draft regulation by the Office of Information and Regulatory Affairs under Executive Order 12866.

*Source:* 2014 Regulatory Indicators Survey results, www.oecd.org/gov/regulatory-policy/measuring-regulatory-performance.htm.

### *Analysis of the impact of the proposed regulation on national legislation*

This is a qualitative analysis about "specifying whether the proposal fills any existing gaps in the legal system or if it is a proposal which seeks to modify or repeal current laws or regulations. The analysis must include a reference to background information, a diagnostic assessment of the current situation and the proposal's objectives. If the purpose is to modify or repeal a current law or regulation, an analysis must be made as to its suitability or effectiveness, including a specific list of flaws, gaps or defects that need to be corrected through regulatory action."[19]

Taken together, the main problem with these requirements for the preparation of draft regulations, or modifications to existing ones, is that in practice they are not always properly enforced. In practice, only a statement declaring that any other legal provisions that oppose the current one are derogated is added to the draft proposal. As a result there is no systematic review of the quality of regulations before they are developed and implemented. This is particularly true for the obligation to prepare a cost-benefit analysis which is intended to demonstrate the net benefit of the proposal.

### *Regulatory transparency and public consultation*

Regulatory transparency is a broad concept with different dimensions. For example, it might involve a process of communication of regulations and regulatory decisions, it might involve the more familiar concept of public consultation during the regulatory making process, but it might as well involve a broader engagement in decision-making or simply a better organisation of existing regulations. As a result, transparency is normally present at different stages of the regulatory cycle.

Transparency's importance stems from the fact that it can address many of the causes of regulatory failures, such as regulatory capture and bias towards concentrated benefits, inadequate information in the public sector, rigidity, market uncertainty and inability to understand policy risk, and lack of accountability (OECD, 2011). Moreover, regulatory transparency through public consultation allows for public participation of stakeholders in the regulation-making process as well as in the revision of regulations, which can help governments understand citizens' and other stakeholders' needs and improve trust in government. Also, it can help governments collect more information and resources, increase compliance, and reduce uninformed opposition. It may enhance transparency and accountability as interested parties gain access to detailed information on potential effects of regulation on them (OECD, 2012).

As in the case of the *ex ante* assessment of regulatory proposals, Peru has introduced different legal requirements and practices in terms of regulatory transparency, which represent positive developments towards an improved regulatory making process. However, important challenges lie ahead.

In Peru, regulatory entities have no legal obligation to publish – prior to their development – the list of regulations they are planning to issue in the future or the near future. Although strategic planning is a common practice it does not necessarily include regulatory forward planning. This lack of forward planning normally adversely affects the participation of stakeholders in public consultations at later stages given that the public is not aware of forthcoming regulatory proposals.

The Law on Prior Consultation of Indigenous Peoples is probably the only law framing and requiring a process of "public consultation" during the rule-making process; however this obligation is constrained to legislative or administrative draft regulations that may directly affect the collective rights of these peoples, their physical existence, their cultural identity, their quality of life or their development.[20]

Other than that, the LOPE, the General Administrative Procedure Law and the *Reglamento* that regulates the publicity, the publication of regulatory proposals, and the dissemination of regulations,[21] establish general legal obligations to publish draft regulatory projects before they come into force. Although the practice is highly variable from one entity to another, this is normally done through a ministerial or vice-ministerial resolution that approves the publication of the draft proposal along with the description of

motivation for issuing the regulation on the website of the sponsoring ministry or agency. This pre-publication of regulatory proposals points at the right directions in terms of stakeholder engagement practices to improve the quality of draft regulation, but more profound measures could be adopted.

First, this "notice and comment" form of consultation occurs once the regulatory proposal has been drafted, which occurs once important decisions on the draft proposal have been made. The OECD recommends undertaking consultation as early as possible in the regulation-making process, i.e. in the early stages, so as to allow a wider public participation and increase the amount of information received, which can then be used for the design of the draft regulatory proposal. Second, no provisions or guidelines are established to address the public´s feedback and, if applicable, modify the drafts accordingly. As a result, it is not clear the way comments or information received are analysed and integrated, and thereby whether they have an impact on the draft regulation. Third, although this type of consultation has key advantages such as being fast and cheap to implement, it also has some drawbacks in that it may exclude some groups (i.e. without internet access) and does not create dialogue since once the comments are submitted the consultation is completed. Generally, other methods of consultation such as focus groups, business test panels, public meetings or advisory committees are rarely used.

Some entities though have developed more robust consultation frameworks. For instance, the Ministry of the Environment issued a *Reglamento* on Transparency, Public Access to Environmental Information, and Public Participation and Consultation in Environmental Matters,[22] which regulates the participation of the public in environmental issues including the development of new regulations, defines a series of consultation mechanisms, and sets guidelines on how to conduct the consultation process. The Ministry also has a special webpage for public consultations where each draft regulation, the time period for submitting comments, and a contributions matrix template are posted.[23]

Another dimension of transparency in the regulation-making process has to do with the clarity of regulations. If the wording of the rules is unclear or has an unnecessarily complex structure, problems may arise at the time of implementation and enforcement. It is important that citizens are able to understand regulations without being legal or technical experts. In this sense, chapter III of the manual of legislative technique from the MINJUS provides guidelines and principles for the drafting of regulatory proposals. In particular Section 3.1 states that "when drafting a regulatory proposal, the use of plain, non-technical language should be sought to the extent possible, in order to allow the regulation to be clearly understood by all and in the same way." Even though all regulatory proposals are reviewed by the legal department of the proponent ministry or agency, it is not clear to what extent these guidelines are used. Moreover, when it comes to the MINJUS to perform its oversight function, not only not all draft proposals are reviewed, but the opinion tends to focus more on aspects of constitutionality, legality or legal coherence than on the use of plain language.

Here again, the lack of oversight mechanisms leads to a diversity of varying practices among regulatory entities to the detriment of regulatory quality control.

### *Regulatory quality in the Peruvian Congress*

In Congress, draft regulations are scrutinised at several points during the legislative process. For instance, when the initiative is presented; while analysed in committees; when debated; when presented to the President of the Republic for observations or

signature, and in case the Presidents returns which then goes back to committee discussions. These "filters", however, are not necessarily or primarily concerned with the assessment of the quality of the draft regulation.

The requirements intended to play the role of *ex ante* assessment of legislative proposals, in particular the description of motivation for issuing the regulation (*exposición de motivos*) and the cost-benefit analysis, have in practice become a mere formality to comply with, but without an effective assessment. In addition to this situation, there is no entity within the Congress who plays the role of "gatekeeper", responsible for verifying the content and quality of the analysis derived from these requirements. Committees are charged with the duty of issuing an opinion regarding the proposals they receive, but they actually often do not have the technical capacity to verify the quality of the analysis and just check that the formal requirements have been met.

In terms of consultation and engagement in the regulation-making process, the legislative process allows for public participation at different stages of the process, in particular during the early stages. As mentioned before, once a legislative initiative meeting all formal requirements is received, it is published on the Congress website. So the public at large can see which initiatives are under consideration in Congress and may therefore submit comments. At a later stage, the opinion issued by Committees is also published on the Congress website, the Congress gazette or in the official gazette "El Peruano". The opinion itself must include an annex with the comments received so far.

In addition to these consultation mechanisms, it is often the case that Congress – through its Committees – convenes stakeholders and specialists to participate in focus groups, workshops, public hearings, etc. The objective is to engage public participation and to better understand the needs and issues at stake, so as to improve legislative proposals. It is commonplace that in the committee's resolutions, a summary of the comments received by the public, and sometimes an answer to them is included. Yet, just as in the executive, there is not a systematic practice to reveal to what extent this participation and the comments received are considered in the improvement of draft regulations, and therefore how the initial proposals change as a result of the inputs received.

## Assessment

***Although some of the building blocks have been set, Peru lacks a full-fledged system for ex ante evaluation of draft regulation and of regulations that are subject to modifications, in order to assess whether they provide a net positive benefit to society, and whether they are coherent with other government policies.***

When preparing draft regulations, or draft modifications to existing ones, ministries and agencies have the legal obligation to prepare a cost-benefit analysis as an *ex ante* evaluation, to demonstrate the net benefit of the proposal. Similarly, there are legal obligations to publish the draft regulatory projects before they come into force, although no provisions are established to consider the public´s feedback and modify the drafts if applicable. There is also the Manual on Legislative Technique issued by the MINJUS which provides ministries and agencies with guidance on how to draft a piece of regulation from a legal quality point of view. However, these practices are not always enforced properly, and as a result there is no systematic review of whether regulations are

"fit-for-purpose" and provide a net positive benefit to society before they are implemented.

The MINJUS has as one of its objectives to assess the constitutionality and legality of norms that go through the CCV or need approval of the Council of Ministers or the President. When the cost-benefits of draft regulation are prepared, the MEF has so far taken a leading role in evaluating them. This role has more prominence in the case of draft regulations that goes through the CCV, although in other cases of sectoral regulation, the MEF also issues an opinion. Similarly, the Ministry of Economy and Finance regularly assesses policies and draft regulations using comparative analysis and benchmarking of good international practices. This specialisation has led to the generation and accumulation of a critical mass of capacities and expertise which should be exploited when implementing and adopting a full-fledged regulatory policy in Peru.

Across OECD countries, it is commonplace that ministries with the portfolio of finance, economy, or the promotion of business competitiveness concentrate the role of "gate keepers" to ensure quality of new rules. In fact, in 13 OECD countries, the oversight of the process of *ex ante* assessment of draft regulation falls on ministries of finance, ministries of economy or treasuries (OECD, 2015a). This institutional setting may reflect the need to have a ministry that can exert "soft power" to ensure the compliance of regulatory policy by other government agencies.

***The Vice-ministerial Coordinating Council (CCV) is a mechanism to assess the quality of draft regulations or its modifications, but only multi sector regulation goes through this process***

In practice, the treatment of multi sector regulations differs greatly from regulations which involve only one sector. Multi-sector regulation goes through a more rigorous process of *ex ante* evaluation. In principle, all sorts of draft regulation should have a proper *ex ante* assessment of impact. The drafting process for new regulations that involve only one sector is carried out exclusively by the regulatory agency sponsoring the regulation and, most of the times, is not overseen at any stage of the process by any other institution; as a result it is not clear whether those regulations actually comply with legislative drafting guidelines issued by the MINJUS, with the cost-benefit analysis that some of the regulations must include, or the general pre-publication obligations. As a consequence, this type of regulations can be issued without considering the input of stakeholders, and without an assessment of the potential impacts they could impose on society.

Multi sector draft regulations on the other hand have to be discussed before their adoption and implementation by the Vice-ministerial Coordinating Council (CCV), which plays to some extent a role of an oversight body – without having a mandate in this sense – as any of its members (thirty fie vice-ministers) is allowed to raise substance or quality issues. Thus, the CCV plays an important role in promoting policy coherence across policy portfolios and consistency with overarching public policy objectives. Nevertheless, the fact that proposed draft regulation will not be adopted until all issues have been cleared provides a de facto veto role to each of the vice-ministries participating in the CCV. As a result, there is the risk that the CCV may create bottlenecks in the policy process, or bargaining strategies with negative trade-offs amongst vice-ministries may appear.

## Key recommendations

- Peru should introduce a system of *ex ante* impact assessment, i.e. a Regulatory Impact Assessment, for draft regulations and regulations that are subject to modification, as part of its administrative processes. The RIA system would require all regulators to prepare a RIA in order to help them in the development of new regulations. Threshold criteria could be employed to define the depth of the assessment efforts in regulations with the largest impact (see Box 3.2 for an international example).

### Box 3.2. *Ex ante* impact assessment in Australia

In Australia, a preliminary assessment determines whether a proposal requires a Regulation Impact Statement (RIS) and helps to identify best practice for the policy process. The document consists on a summary of the answers to the seven RIS questions and is assessed by the Office of Best Practice Regulation.

The seven RIS questions are very important as they help policy makers to focus on the regulatory impact of major the decisions and encourage them to think beyond a regulation based solution as the default.

- What is the problem you are trying to solve?
- Why is government action needed?
- What policy options are you considering?
- What is the likely net benefit of each option?
- Who will you consult about these options and how will you consult them?
- What is the best option from those you have considered?
- How will you implement and evaluate your chosen option?

A Regulation Impact Statement is required for all Cabinet submissions. This includes non-regulatory, minor or machinery nature proposals and proposals with no regulatory impact on business, community organisations or individuals.

A RIS is also mandatory for any non-Cabinet decision made by any Australian Government entity if that decision is likely to have a measurable impact on businesses, community organisations, individuals or any combination of them.

The content of a RIS depends on the type of RIS required. There are three types of RIS: Long Form, Standard Form and Short Form. A long form RIS contains answers to all seven RIS questions, analysis of genuine and practical policy options, analysis of the likely regulatory impact, evidence of appropriate public consultation, a formal cost-benefit analysis; and a detailed presentation of regulatory costings and offsets.

A standard form RIS contains answers to all seven RIS questions, analysis of genuine and practical policy options, analysis of the likely regulatory impact, evidence of appropriate public consultation, and a detailed presentation of regulatory costings and offsets.

A short form RIS contains a summary of the proposed policy and any options considered, an overview of the likely impacts and an outline of regulatory costs and cost offsets.

*Source*: Adapted from the Australian Government Guide to Regulation, http://cuttingredtape.gov.au/handbook/australian-government-guide-regulation (accessed 7 April 2016).

- The oversight body suggested before should have a clear mandate to oversee the process of development of new regulations, and in particular to supervise the quality of both RIAs and draft regulations (see Box 3.3 for an international example). As a first step and until this oversight body is created, and taking advantage of its capacities and specialisation, the MEF should be given the authority within the Coordinating Council on Regulatory Policy to review all RIAs, including the capacity to ask regulators for their improvement. This would involve giving MEF the required human and technical resources, as well as the legal attributions, to perform this task, and implement a pilot program as a training mechanism for both MEF and regulatory agencies. RIA manuals and technical guidelines (for instance for developing the cost-benefit analysis) should also be developed by MEF.

### Box 3.3. **Oversight of RIA in Mexico**

In Mexico, the Federal Law of Administrative Procedure (LFPA) establish that all general administrative acts, such as regulations, decrees, presidential agreements, technical standards (NOMs), circulars and formats, as well as handbooks, guidelines, criteria, methodologies, instructions, directions, rules, or whatever instrument that establish specific obligations to citizens and businesses, issued by ministries or decentralised bodies of the federal public administration, to be published in the Official Journal of the Federation (DOF) to come into force and have legal effects. But in order to be published, agencies and federal decentralised bodies must submit to the DOF to the opinion issued by the Federal Commission for Regulatory Improvement (COFEMER) which is the agency responsible for regulatory policy and has an oversight function for regulatory quality. This function consists in to promote transparency in the development and enforcement of regulations, ensuring that they generate benefits that outweigh their costs.

To have the opinion, ministries or decentralised bodies must submit to COFEMER the draft regulation accompanied by regulatory impact assessment (RIA), who publish them on its website since the moment that receive them. From now and until COFEMER not give its final opinion, interested parties may send comments to COFEMER that they could have to the RIA and the draft regulation. COFEMER issue an opinion of the draft regulation, which should consider the comments, if any, received from stakeholders and send it to the ministries or decentralised bodies owner of the regulation, who will address the comments received, either incorporating them into the draft or arguing the reason why will not be considered.

Upon receipt of the response, COFEMER shall issue a final opinion within no more than 5 business days. This final opinion it has to be presented to the DOF in order to that regulation can be published and produce legal effects.

*Source:* Federal Law of Administrative Procedure of Mexico, articles 4, 69-A, 69-E, 69-H, 69-J, 69-L

- As part of this oversight function by the Coordinating Council on Regulatory Policy, the MINJUS should be given the mandate to assess the constitutionality and legality of the draft regulation, enforce the application of the legislative drafting guidelines and overseeing the legal quality of all draft regulations. On the other hand, the PCM through the Secretariat of Public Administration should be given within the Coordinating Council on Regulatory Policy the mandate to oversee that all draft regulations reflect co-ordination and coherence with public

policies at the national level, that they follow the guidelines on administrative simplification, and that they abide to principles on the structure and functioning of the government.

- A number of elements should also be considered as part of the adoption of RIA:
  - All draft regulations and RIAs should be made available for consultation by the public at large for a minimum of 30 days (see Box 3.4 for an international example).
  - Consultation should be systematic at the early stages when policy options are being defined and impact assessment is being developed, and once a draft regulation and a draft RIA have been produced.
  - Public comments should also be made available and regulatory agencies should be held accountable for their treatment.
  - A system of forward planning should be created in order to make the development of new regulations more transparent and predictable.
  - As part of the RIA process, evidence on the problem that is faced, objectives and options should be properly addressed, while evaluating all relevant impacts, including those on competition, trade, and SMEs.
  - Promotion of the use of risk-based approaches to regulations and compliance.

### Box 3.4. **The European Commission's stakeholder consultation framework**

The obligation for the European Commission to consult is enshrined in the Treaty on European Union and forms an essential element of policy preparation and review.

The Commission adopted on 19 May 2015 its "Better Regulation Package" which includes strengthened consultation commitments. The Commission intends to listen more closely to citizens and stakeholders, and be open to their feedback throughout the policy cycle – from the first idea outlined in "roadmaps" or "inception impact assessments" to when the Commission prepares a proposal and assesses the likely impacts, through the adoption of legislation and its evaluation.

Key novelties are the establishment of a consultation strategy for each initiative before the work starts (the strategy sets the consultation objectives, identifies stakeholders, and determines the most appropriate consultation activities); obligatory 12 week internet-based public consultations for all initiatives subject to an impact assessment, evaluations and Fitness Checks and Green Papers; feedback opportunity for citizens and stakeholders on "roadmaps" and "inception impact assessment", on legislative proposals adopted by the Commission and on draft implementing and delegated acts.

The "Better Regulation Guidelines" have been developed to ensure high quality and transparent consultation activities. Four general principles (participation, openness and accountability, effectiveness, coherence) are complemented by minimum standards which require in particular:

- Clear content of the consultation process and documents;
- Possibility for all relevant parties to express their opinions;
- Adequate awareness-raising publicity and communication channels adapted to the target audience. This includes publication of all open public consultations on the website "Your Voice in Europe" http://ec.europa.eu/yourvoice/index_en.htm;

Box 3.4. **The European Commission's stakeholder consultation framework** (*cont.*)

- Provision of sufficient time for responses: minimum 12 weeks for open public consultations; and
- Acknowledgment and adequate feedback.

*Source:* European Commission (2015), Better Regulation website, http://ec.europa.eu/smart-regulation/index_en.htm (accessed 22 May 2015).

- Peru should also consider issuing guidelines in order to establish clear boundaries as to the extent of comments from attending officials to the CCV, who should constrain their comments according the legal competences of the office they represent. Alternative forms of governance arrangements should be considered for the CCV, in order to avoid the power of veto that each member of the CCV currently has.
- Once the Coordinating Council on Regulatory Policy or the oversight body are introduced, and a RIA system is introduced even in pilot phase, the RIA should be part of the assessment from the CCV. The analysis that has to be carried out by the MEF, the PCM and the MINJUS should be done before the draft regulation goes to the CCV, with adequate period to carry out the analysis. The opinion issued by the Coordinating Council on Regulatory Policy or the oversight body on the draft regulation and the RIA should be considered as part of the assessment of the CCV.

# Notes

1. Article 104 of the Political Constitution establishes that Congress can delegate authority to the Executive Branch to legislate through legislative decrees on specific issues and during a fixed period of time set forth in the law granting said authority. Emergency decrees are extraordinary measures taken by the executive in economic and financial matters; they seek to reverse extraordinary and unforeseen circumstances. The President must notify Congress of every legislative and emergency decree. The Constitutional Tribunal established that Emergency Decrees must meet the following criteria: 1) Exceptionality, 2) Necessity, 3) it must be transitory, 4) Generalness 5) It must have clear linkages

2. This is the norm with the highest level among subordinate or secondary regulations; it regulates general matters and is signed by the President of the Republic and one or more cabinet ministers, with the corresponding legal mandate depending on the subject matter.

3. Law No. 26889.

4. Approved by the Supreme Decree No. 008-2006-JUS: Ministerio de Justicia, Reglamento de la Ley Marco para la Producción y Sistematización Legislativa.

5. See, Law No. 27444: General Administrative Procedure Law (*Ley del Procedimiento Administrativo General*), Title II, Chapter VII, Article 185.

6. See, LOPE, Article 13.

7. See, Supreme Decree No. 001-2009-JUS, Ministry of Justice and Human Rights, By-law which lays down rules on advertising, publication and dissemination of Legal Rules of General Nature. (*Ministerio de Justicia y Derechos Humanos, Reglamento que establece disposiciones relativas a la publicidad, publicación de Proyectos Normativos y difusión de Normas Legales de Carácter General*).

8. See, Ministry of Justice and Human Rights, Guía de Técnica Legislativa para Elaboración de Proyectos Normativos de las Entidades del Poder Ejecutivo, prepared by the General Directorate of Legal System and Development, available on www.minjus.gob.pe/wp-content/uploads/2016/07/minjus-dgdoj-guia-de-tecnica-legislativa-3era-edici%c3%b3n.pdf.

9. See, Ministerial Resolution Nº 639-2006-EF/67: Manual for the Economic and Legal Analysis of Normative Production (*Manual para el Análisis Económico y Legal de la Producción Normativa*), and Guidelines for the Improvement of the Quality of Norms and Regulations (*Lineamientos para el Mejoramiento de la Calidad de Normas y Regulaciones*).

10. See, Ministerial Resolution No. 826-2005 / MINSA (as amended by RM No. 526 2011 / MOH): Standards for the Preparation of Legal Documents at the Ministry of Health (*Resolución Ministerial No. 826-2005/MINSA, modificada por la RM No. 526-2011/MINSA,: Normas para la Elaboración de Documentos Normativos en el Ministerio de Salud*).

11. See Ministerial Resolution No. 251-2013-PCM: PCM, Reglas Generales de la Comisión de Coordinación Viceministerial.

12. Some variants may occur in the case of proposals such as the law governing constitutional reform, budgetary laws, and authoritative laws concerning delegated legislation, among others.

13. Article 107 of the Constitution sets out those entitled to propose bills and legislative resolutions, i.e. initiate laws, before the Congress.

14. The Council of Spokespeople may waive these requirements with a vote that represents no less than three fifths of the members of Congress.

15. Article 2 of Law No. 26889, and Article 2 of its by-law. This section can also be known as background (*antecedentes*), general framework (*marco general*) or proposal (*propuesta*)

16. Article 3 of the Regulations of Law No. 26889. It is common that this section is also included as part of the description of motivation.

17. Article 4 of the Regulations of Law No. 26889. It is common that this section is also included as part of the description of motivation.

18. The Law of Financial Equilibrium of the Public Sector Budget (*Ley de Equilibrio Financiero de Presupuesto del Sector Público*) obliges that all new regulatory proposals must include an assessment of the impact on the budget and must demonstrate that there are budgetary resources available. In order to meet these requirements, regulatory proposals usually include the statements that no additional costs or expenditure are generated.

19. Article 4 of the *Reglamento* of Law No. 26889.

20. Law No. 29785: Law of Prior Consultation of Indigenous Peoples (*Ley del Derecho a la Consulta Previa a los Pueblos Indígenas u Originarios, reconocido en el Convenio 169 de la Organización Internacional del Trabajo*), Article 2.

21. Supreme Decree No. 001-2009-JUS, Ministry of Justice and Human Rights, by-law which lays down rules on advertising, publication and dissemination of Legal Rules of General Nature (*Ministerio de Justicia y Derechos Humanos, Reglamento que establece disposiciones relativas a la publicidad, publicación de Proyectos Normativos y difusión de Normas Legales de Carácter General*).

22. See Supreme Decree No. 002-2009-MINAM: By-law on Transparency, Access to Environmental Public Information, and Citizen Participation and Consultation in Environmental Matters (*Reglamento sobre Transparencia, Acceso a la Información Pública Ambiental y Participación y Consulta Ciudadana en Asuntos Ambientales*).

23. www.minam.gob.pe/consultaspublicas/.

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*Chapter 4*

# Management of the stock of regulation and administrative simplification policies in Peru

*This chapter describes the efforts and achievements of Peru in managing and simplifying the stock of regulations in Peru. It is found that although a strategy for administrative simplification is in place, oversight of its implementation should be enhanced. These efforts are further undermined because the Peruvian government lacks a baseline of administrative burdens emanating from formalities and information obligations for business and citizens, which can make difficult to target resources and communicate results. Peru should ensure the full implementation of the policies of administrative simplification, which should include evaluation of the impacts, and should consider establishing a programme on* ex post *evaluation of regulation.*

Administrative simplification is a tool used to review and simplify the stock of regulations. Reducing the administrative burdens of government regulations on citizens, businesses and the public sector through administrative simplification should be a part of the government's strategy to improve economic performance and productivity. Additionally, the evaluation of existing regulations through *ex post* impact analysis is necessary to ensure that regulations that are in place are effective and efficient. In this chapter recent and current initiatives and practices implemented by Peru on administrative simplification and ex post analysis of regulation are described and discussed.

## Inventory of regulations

In Peru, regulation is issued by several institutions such as Congress and the executive at central, regional and local level. Therefore, citizens and businesses have to comply with a myriad of laws, by-laws and other types of regulations. Although, there are several repositories of these regulations, a consolidated inventory of all the regulatory stock with free access to the public is not available in a single website, not even for the central national level.

For instance, the Peruvian Congress has a free access website called Digital Legislation File of Peru (ADLP, *Archivo Digital de la Legislación del Perú*).[1] This website contains mainly law level regulation. The ADLP inventory includes current and historic regulation of Peru, as well as Indian Laws and laws in Quechua.

Regarding current regulation, the ADLP contains the Peruvian constitution, legislative decrees, urgency decrees, constitutional laws, regional laws and extraordinary supreme decrees. Nevertheless, this website does not include secondary regulation, which provides important complementary regulatory obligations, as they indicate how primary regulation is to be implemented.

The Ministry of Justice and Human Rights (MINJUS) has a website called Peruvian System of Legal Information (SPIJ*, Sistema Peruano de Información Jurídica*).[2] The legal foundation for this inventory is Article 7 section J of the Law No. 29809: Organizations and Functions of the Ministry of Justice and Human Rights (*Ley de Organización y Funciones del Ministerio de Justicia y Derechos Humanos*, LOFMJDH). This article establishes specific obligations for the Peruvian government to compile and make available the legislation and legal information to promote their study and diffusion. The SPIJ was a project in 1994 between the MINJUS and the United Nations Development Program (UNDP), with the objective to systematise and disseminate legal information to the society and enhance professional and technical competences of law operators and public officials.[3]

The SPIJ contains the inventory of current regulation for the central, the regional and local levels of government. Additional to the regulations published in the ADLP, the SPIJ offers complete texts of subordinate regulations, plus administrative acts, regional and local ordinances (*ordenanzas*), TUPAS, codes, jurisprudence, amongst others. The SPIJ provides two types of access to users: a basic free service and a paid service. The free service includes access to a limited set of regulation, and the texts are only available in web format. The paid services incorporate the complete set of regulations, and texts can be accessed in both web and PDF format. Fees for the complete services are published in the website of the SPIJ.

Sub-sets of the inventory of the legal framework can also be consulted in the regular webpages of ministries and agencies of Peru, as well as in their transparency webpages. For instance, there is the Standard Transparency Portal of the Peruvian State (PTE, *Portal de Transparencia Estandard*).[4] In this portal, users have access to the specific legal framework of Peruvian public institutions (see Box 4.1). The Portal also includes information on regional and local governments, and it provides links to local and regional websites on transparency which contain their basic regulatory framework.

### Box 4.1. **Transparency and public information access law in Peru**

The transparency principle in Peru is embedded in Article 2, Fraction 5 of the Constitution: "Every person has the right to request information without stating the reason and to receive it from any public entity in the legal response time with the cost implied. Information regarding personal intimacy and the one excluded for law and national security reasons are exempt. The banking secrecy and tax reserve may be requested by means of a judge, the Attorney General or a Congress commission with basis on the law".

**Transparency portal**

Law No. 27806 defines the topics that entities of the Peruvian Public Administration must publish on their website:

1. ***General information*** regarding their organisation chart, procedures, legal framework, and *TUPA*.
2. ***Budgetary information*** including data about the spent budgets, investment projects, salaries, senior officials' benefits.
3. **Goods and services procurement** which must include the detail of the committed amounts, information of suppliers, quantity and quality of the goods and services.
4. **Official activities** conducted by senior officials, including the head of the organisation and the next hierarchy-level officials.

**Transparency on Public Finance Management**

Every agency of the public administration is obliged to publish quarterly:

1. The budget with specification of revenues, expenditure, funding, and financial results of operations.
2. Public investment projects, including the total budget of the project, the budget of the corresponding quarter, level of progress, and accumulated budget.
3. Information on staff and personnel.
4. Information regarding hiring processes of personnel and acquisitions of goods.
5. Progress on performance evaluation indicators according to the institutional strategic plans.

*Source*: Peruvian law on Transparency and Access to Public Information (*Ley de Transparencia y Acceso a la Información Pública*).

The practice in Peru of offering inventories of regulation is widespread. Nevertheless, in order to promote regulatory compliance and offer a fair regulatory process to citizens, it is important to guarantee access for the whole population to the full stock of regulation

in an easy and friendly manner. This can be promoted through the centralisation in one portal with unlimited free access to the complete stock of regulation and for all type of users. This action would not preclude other public institutions at central, regional or local level to publish legal information of their competence.

It is of note Peru's effort to include in the SPIJ an inventory of regulations from regional and local governments. This inventory can be an important starting point to undertake administrative simplification efforts and assessments of existing regulations at local and regional level.

## Formalities in Peru

### *Text of Administrative Procedures*

One of the pillars of regulatory transparency and administrative simplification efforts in Peru is the Single Text of Administrative Procedures (TUPA). Defined by the LGPA, this tool seeks to standardise the information to be provided by public agencies regarding information obligations for citizens and businesses, formalities and frontline services; as well as to simplify them. With the publication of the TUPAs, the government aims at providing legal certainty to citizens and businessman on the way the governments interacts with them. According to Article 1 of the LPGA, the TUPA is an obligation for all entities of the central, regional and local governments, and also to other institutions of the public administration, such as independent economic regulators.

Agencies must publish their TUPAs in the Official Gazette and in their website, when these have a nationwide application (Article 38.4 of the LPGA), or in the Journal of Judiciary Notices of the region and province when the TUPA has only legal application at regional or local level (Article 38.3 of the LPGA).

The information to be provided in the TUPA consists of the following elements (Article 37 of the LPGA):

- a detailed description of the information to be submitted;
- The "type" of procedure: either if there will be an automatic response, or whether it involves an evaluation;
- The fees to be paid;
- Whether a silent of consent or silent is denied rule is applied;
- The government office to submit the information or request the public service;
- The government office with the legal competence to approve or deny the request; and
- The government office with the legal competence to handle the appeals.

This practice provides users with certainty as to their legal obligations when complying with information obligations, formalities, and when requesting government services (see Box 4.2 for an example). The TUPAs can also serve as a key tool to facilitate the measurement and reduction of burdens for citizens and businesses. As the LGPA states in Article 38.6, the TUPA also seeks to avoid duplicity in regulations across government agencies.

### Box 4.2. **TUPA in practice: TUPA Model for the Operating License and Technical Inspections on Edification Security**

By means of Ministerial Resolution No. 088-2015-PCM, the PCM approved the TUPA model for operating licenses and technical inspections on edification security (ITSE) for local governments across Peru. The TUPA establishes criteria to ensure consistency of the information demanded by municipal governments in the aforementioned process. In principle, all provincial or district municipalities with legal competence to operate licenses and technical inspections on edification security have to comply with the implementation of this TUPA.

In a scenario in which every municipality implements the TUPA for the ITSE accordingly, investors would have certainty over the legal process to obtain these types of permits in every potential location.

The Ministerial Resolution of this TUPA, also establish provisions for the simplification of the process. It sets that municipalities are allowed to modify the approved model only if more favourable conditions for user are introduced. The conditions can include fewer information demands or shorter government response times. In the Ministerial Resolution, guidelines for both operating licenses and technical inspections on edification security are also published. The model establishes 22 types of licences and 10 types of inspections.

The TUPAs also includes the entire regulatory framework that pertains to the specific formality. For example, for the Operating License for establishments with an area up to 100 m2, its TUPA includes all the legal basis enlisted below:

- Law No. 27972, Organic Law of Municipalities
- Law No. 29060, Administrative Silence Law
- Law No. 27444, Law of General Administrative Procedure
- Supreme Decree No. 30230, ITSE Regulation Framework
- Law No. 28976, Framework Law of Operating Licenses
- Law No. 30230 Law that Establishes Tributary Measures, and Simplification of Procedures and Permits for the Promotion and Boosting of Investment in the Country.

In this TUPA, provisions for different types of business are included; for instance, edifications or installations up to 100 $m^2$ for the development of stores, lodging establishments, restaurants, cafeterias and health establishments. It also includes the cases in which this type of TUPA does not apply, which in the case for the 100m2 license, it excludes establishments using more than 30% of its total area for storage purposes, establishments to sell alcohol, slot machines, among others, or commercializing flammable substances and establishments that require a multidisciplinary *ex ante* ITSE.

The information demanded is listed as general and specific. In this example, general information demanded include a request:

- ID number of the person applying for the license;
- Copy of the legal representation of the person applying in case of businesses
- Details of the payment receipt of the fee, and
- Sworn declaration that safety conditions are met.

The specific information demanded is:

Box 4.2. **TUPA in practice: TUPA Model for the Operating License and Technical Inspections on Edification Security** (*cont.*)

- Copy of the professional degree for health related services;
- The number of parking spaces in line with applicable regulation;
- Copy of the industry authorisation issued by the relevant administrative authority, as defined in the Supreme Decree No. 006-213-PCM,[1] and
- Copy of the authorisation of the Ministry of Culture.

The deadline for a government response is set at 15 days, and the government official with competence to provide authorisation is the Head of Office. Finally, the appeal is to be conducted by the hierarchically superior official of the Head of Office.

1. The Supreme Decree No. 006-213-PCM defines what authorities have faculties to issue the industry authorisation depending on specific types of commercial activities.

*Source:* Ministerial Resolution 088-2015-PCM.

### *Unique system of formalities*

The Unique System of Formalities (SUT) was created on September 2015 with the purpose of enhancing the functionality of the TUPA. Article 6 of the Legislative Decree No. 1203 indicates that the SUT is designed as an *"information technology tool for the elaboration, simplification and standardisation of the TUPA, as well as an official repository of the administrative procedures and services offered exclusively with its supporting information by the Public Administration entities"*. The system managed by the Secretariat of Public Management of the PCM must include: a) legal basis of the administrative procedures and services given in exclusivity by the Peruvian State; b) basis for the fees to charge to citizens to submit the formality; c) tools that allow for the simplification of procedures, and d) the publication in real time of approved TUPAS.

The adequate development and implementation of the SUT system can enhance the functionality of the TUPAs. Nonetheless, the current arrangement of the SUT implies a closed system: the platform is not entirely open, as the website asks for the Peruvian ID Number and a password. The nature of this system calls for an open arrangement; every citizen, business and even foreign user should have access to every piece of information of the administrative procedures.

## Administrative simplification strategy

### *Legal basis in Peru for the administrative simplification policy*

A primary source of the administrative simplification policy of Peru can be found in the sources of the policy of modernisation of the Peruvian government. The concept of government modernisation includes elements of regulatory quality such as administrative simplification, as well as open and digital government, amongst others. Law No. 27658: Framework Law of the Modernisation of the State Management (LMMGE, *Ley Marco de la Modernización de la Gestión del Estado*) refers in Article 1 to the modernisation process of the Peruvian State. This process must be co-ordinated by the *executive power* through the *General Direction of the Public Management* of the PCM and the legislative

power with the *Commission of Modernisation of State Management*. An important declaration of this law is that the modernisation process has an efficiency objective in the state administration, with a focus to achieve better citizens' services (Article 4).

Article 5 of the LMMGE specifies the main actions of the modernisation process of the Peruvian state: 1) efficiency in the usage of state resources, and 2) the institutionalisation of the performance assessment system, through the usage of technological resources, strategic planning, transparency and accountability. On the other hand, Article 11 indicates that obligations from public officials to citizens include: 1) the provision of unbiased, trustable, confident and timely services; and 2) the provision of required information in a timely manner.

Law No. 29158: Organic Law of the Federal Branch (LOPE, *Ley Orgánica del Poder Ejecutivo*) also makes references to the modernisation duties of the government. This law indicates in Article 19-4 that the PCM has to formulate, approve and execute, national modernisation public policies, as well as to lead the organisation of the State and the modernisation process. Thus, the PCM is in charge of the simplification strategy within the central government.

A direct reference to the policy on administrative simplification is set in Law No. 27444: of General Administrative Procedure (LPAG, *Ley de Procedimiento Administrativo General*). It states in Article IV a *Simplicity Principle* for formalities: "The established formalities by the administrative authority must be simple, eliminating any unnecessary complexity; that is, information requirements must be rational and proportionate to the objectives to be achieved". This principle matches a standard administrative simplification objective, which focuses on making regulation effective and without excessive administrative burdens.

The LPAG specifies in Article 48 that the PCM can provide advice on issues on administrative simplification, and can evaluate on a permanent basis the administrative simplification process of public entities. Additionally, Article 36-3 of the LPAG states that the elimination of procedures, information obligations or formalities, or simplifications measures can be approved by Ministerial Resolution, and by regional norms, according to the level of government.

## *Administrative simplification efforts*

### *Administrative simplification methodology*

The legal instruments mentioned above gave origin to the Supreme Decree No. 007-2011-PCM, which approves the administrative simplification methodology and establishes provisions for its implementation (DSSA, *Decreto Supremo que aprueba la metodología de simplificación administrativa y establece disposiciones para su implementación, para la mejora de los procedimientos administrativos y servicios prestados en exclusividad*). This decree must be applied by all public agencies in Peru mentioned in Article 1 of the preliminary title of the LOPE, which include: the executive branch including ministries and public decentralised bodies, the legislative branch, the judicial branch, the regional governments, the local governments, and the public bodies that are granted autonomy by the Constitution.

The DSSA includes an annex with the approved methodology. The methodology has five stages:

1. Diagnostics
2. Re-design
3. Implementation
4. Follow-up and evaluation
5. Continuous improvement and sustainability

The DSSA also defines the working teams within each agency in charge of conducting the simplification strategy, and the profile of public officials who must be part of the team. The working teams include i) the Direction Committee of Administrative Simplification and ii) the Continuous Improvement Team.

According to the DSSA, the Secretariat of Public Management (SGP, *Secretaría de la Gestión Pública*) is in charge of the training of all public officials from all levels of government who are to be involved in administrative simplification tasks. It is also in charge of the evaluation and supervision of these tasks.

### *Administrative simplification policy embedded as part of the National Modernisation Policy*

Peru developed a National Modernisation Policy of Public Management (PNMGP, *Política Nacional de Modernización de la Gestion Pública 2021*).[5] It is the continuation of Supreme Decree No. 025-2010-PCM, which established the National Policy of Administrative Simplification—now derogated.

The PNMGP is based on the recognition that economic growth has not been accompanied by institutional capacity and economic and social development. Poor confidence by citizens on public institutions and low levels of satisfaction are also included as factors shaping the strategy. The PNMGP recognises the main areas for improvement within the public administration:

- Absence of a planning system and problems with the articulation of public budget;
- Inadequate infrastructure, equipment and logistics;
- Inadequate policy of human resources management;
- Deficient design of the organisation and functional structure;
- Inadequate provision of public services;
- Limited result and impact evaluation, and
- Lack of information management methods.

The SGP is in charge of the PNMGP. Its main objective is to conduct the modernisation process and establish an effective public administration with a positive impact on citizens and on the development of the country. The scope of the policy includes all public agencies from all levels of governments, including autonomous bodies. The importance of the PNMGP is underlined by the fact that it comprises the objectives of the modernisation process and the strategy to achieve them. The strategy contains five

pillars which are aligned with three crosscutting policies: i) open government, ii) electronic government and iii) inter-institutional interconnection. The five pillars are:

1. Public policies and operational strategic plans;
2. Budgeting by results;
3. Process administration, administrative simplification and institutional organisation;
4. Civil service based on merits, and
5. Information systems, follow-up, monitoring and evaluation, and knowledge management.

The document also recognises that administrative simplification tools improve the quality, efficiency and availability of process and services.

As it can be observed, administrative simplification is a central policy of the modernisation process. This policy is also aligned with the specific objective of the modernisation process: To implement administration by results and promote administrative simplification in all public entities, with the objective to produce positive results in the improvement of formalities and services oriented to citizens and enterprises.

The PNMGP was followed by the approval and release of the Implementation Plan of the National Policy of Public Management (PI-PNMGP, *Plan de Implementación de la Política Nacional de Modernización de la Gestión Pública*). This document incorporates the vision, the general and specific objectives, actions, indicators, entities with responsibilities, goals, and deadlines of the PNMGP.

The main actions of the PI-PNMGP include:

- Implementation of the methodology for simplification and the methodology for calculating the fees for formalities and administrative services;
- Implementation of the SUT at national level and the adoption of models and common administrative services in public entities;
- Formulation of a normative framework to implement the administration by processes in public administration, and
- Implementation of the strategy of Better Service to the Citizen.

The indicators of the PI-PNMGP to evaluate progress of actions implemented are:

- Percentage of public entities at the executive power with adapted MAPROS (manuals of procedures) to the normative framework of the management of processes.
- Percentage of public entities which have applied the methodology for administrative simplification of formalities and for calculating fees.

The definition of performance indicators is a step in the right direction. However, the indicators defined in the PI-PNMGP focus only on progress in implementation. Performance indicators are needed in order to evaluate the impact of the policy.

### *National Plan of Administrative Simplification*

Based on the publication of the PNMGP, the PCM released the National Plan of Administrative Simplification 2013-2016 (PNSA). The PNSA incorporates an institutional vision, mission as well as general and specific objectives, actions and goals – this instrument replaces the National Plan of Administrative Simplification 2010-14. It stands out from the PNSA a statement of a modern state with focus on citizens and the quality approach. The mission is centred in the implementation of administrative simplification actions based on the PNMGP.

The general objective of the PNSA refers to the "Improvement of quality, efficiency and opportunity of the formalities and administrative services requested by citizens to the public administration". The indicators aimed at measuring progress and impact of these actions are the following:

- At least 50% of citizens should perceive in 2016 that formalities and administrative services have been simplified.
- At least 50% of entrepreneurs should perceive in 2016 that formalities and administrative services have been simplified.

Following the general objective, the document states strategic objectives with strategies and actions and expected results. For instance, for Objective 1: *Promote the implementation of administrative simplification actions oriented to the creation of positive results and impacts for all citizens*, the expected result is that 50% of the procedures and administrative services of public entities have been simplified according to the mechanisms defined by the PCM. Objective 2 is: *Promote the progressive incorporation of information technologies and communications as a strategy to provide quality services and formalities for all citizens*. The expected result is that 5% of the citizens are able to submit and receive an answer online for at least one formality. These targets have to be reached by 2016, along with other intermediate milestones.

### *National Competitiveness Agenda 2014-2018*

The National Competitiveness Council (CNC) is responsible for the formulation of the National Competitiveness Agenda (ANC), which has as a final objective "To enhance the competitiveness of the country to raise formal employment and welfare for the population". A good regulatory environment in the country can contribute to reach the *Global Goals* of the ANC, which are the increase in productivity, the reduction of labour informality, and the lowering of logistic costs.

The ANC describes eight strategies or action lines to improve competitiveness. The second strategy about science, technology and innovation indicates as a chief activity the simplification of administrative, labour and migration formalities to contract foreign workforce. The sixth strategy on human capital also makes reference to the simplification of licensing processes in labour markets.

The seventh strategy is about business facilitation, which includes as Component II, "The optimisation of the management of administrative formalities which have a negative impact on business activities", and one of its goals is the simplification of 100% of formalities linked to private investment.[6]

Finally, strategy eight on natural resources and energy includes a goal regarding the simplification of 100% of administrative formalities in these sectors.

### *Multichannel access strategy*

The PCM developed a strategy to reduce administrative burdens for citizens through the establishment of one-stop shops. By means of supreme Decree 091-2011-PCM from the Secretariat of Public Management, the Better Citizen Services Platform (MAC for its initials in Spanish) was created. Its main purpose as stated in the Supreme Decree is to "increase coverage and optimise the services of the State to deliver a better attention to the citizen through multichannel accesses". There are three forms of one-stop shops, or access channels: physical, virtual and through a telephone platform.

The MAC physical centres follow an "everything-under-one-roof" model, where the citizen may find several public agencies in one single place. However, to date, the public offices participating in this centres have not establish interoperability or interconnection of systems as a part of a more aggressive simplification strategy. That is, if a citizen has to submit the same information to several authorities as part of different formalities, the citizen would have to reach each one of them in turn.

There are currently four MAC physical Centers operating in: Callao, Lima Norte, Piura and Ventanilla. These centres contain different agencies. The Centre of Lima Norte, as Table 4.1 depicts, consists of 21 public entities in the same building. In this centre, people may apply for a wide arrange of services, such as a passport or request a criminal record act. The functioning of the MAC centre is similar to the standard customer service centre model where users take a number depending on the service and visits the corresponding module. Although the MAC centres model as a one-stop-shop is limited due to lack of interconnectivity, this effort constitutes an important initial step towards reducing burdens for citizens and improving front-line government services.

Additionally, the virtual one-stop shop and the telephonic platform supply information on administrative formalities to citizens. The telephonic tool allows for citizens to request information regarding formalities and to schedule appointments in the MAC centres. The virtual platform contains basic information on the formalities covered by the MAC centres. This information is extracted from the TUPAs of each formality.

Table 4.1. **Lima Norte MAC Centre**

| Public agencies | | |
|---|---|---|
| National Bank | National Institute for the Defence of Competition and Protection of Intellectual Property (INDECOPI) | Judicial power |
| Development bank of Peru (COFIDE) | Ministry of Foreign Relations | National Registry of Identification and Civil Status (RENIEC) |
| Notaries Association of Lima | Ministry of Interior | Tax collection authority (SAT) |
| Social Security of Health (ESSALUD) | Ministry of Transport and Communications | Super intendancy for Banks and Insurance (SBS) |
| National Penitentiary Institute (INPE) | Ministry of Labour and Employment Promotion | Integral Security of Health (SIS) |
| National Jury of Elections (JNE) | State Agency for the Supervision of Procurement (OSCE) | National Super intendancy of Public Registry (SUNARP) |
| Ministry of Production | Energy and Mining Regulator (OSINERGMIN) | National Super intendancy of Customs and Tax Administration (SUNAT) |

*Source*: www.mac.pe/mac-lima-norte-2/ (accessed 10 February 2016).

### *Methodology to calculate fees for formalities*

Peruvian public agencies follow a methodology in order to establish the fees for administrative formalities and public services enlisted in the TUPAs. According to Article 45-6 of the LPAG, the President of the Council of Ministries and the Minister of Economy and Finance will set the determination criteria and procedures to set fees for administrative services and formalities. Supreme decree No. 064 -2010-PCM provides legal foundation for the methodology and the Annex to resolution No. 003-2010-PCM/SGP contains details of such methodology.

The methodology aims at calculating the fee, so citizens pay only the cost of the public resources employed in the discharge of the formality or service. The methodology calculates the public officials' activity cost per time fraction for formality and the cost of materials. The sum of all activities costs and materials gives the maximum fee that can be charged to the user. This practice is relevant because it reduces the probability to use formalities as a revenue collection method by regional and local governments.

## Incentives programme for the improvement of the municipalities' management

The Ministry of Economy and Finance (MEF) administrates the Municipal Administration Improvement Incentive Programme (*Programa de Incentivos a la Mejora de la Gestión Municipal*, PIM). It was created by Law No. 29332: Law that creates the Incentive Plan to the Improvement of Municipal Management. The budget of the program is defined yearly and is assigned to municipalities according to the index of the Municipal Compensation Fund prepared by the MEF. An important component of the program is the ranking of municipalities according to the degree of the weighted achievement of goals, the total achievement of evaluated goals, and the track record of past achievements.

The objective of the Law is to incentivise the achievement of policy goals by municipalities through the receipt of direct transfer of financial resources once the policy goals are met. The policy objectives are divided into six categories. One of these is the simplification of formalities, in order to create favourable conditions for the business environment and promotion of local competitiveness.

## E-government in Peru

The basic legal and policy framework for e-government in Peru is the same as for administrative simplification. As mentioned before, an open and electronic government is part of the crosscutting policies of modernisation policy. Thus, e-government in Peru has been given prominent relevance (see Box 4.3).

Concrete efforts in Peru on these areas, however, have not been achieved yet. An exception to this lack of progress is the implementation of the Single Window for Foreign Trade (VUCE, *Ventanilla Única de Comercio Exterior*), which was launched on 2007. VUCE is under the responsibility of the MINCETUR and it was designed to facilitate international trade operations and reduce response times in the associated formalities. According to the IADB, the VUCE has achieved significant efficiency goals, but it has incorporated only a limited number of formalities. Furthermore, it has not been able to exchange information with other e-government platforms. The IADB also identifies improvement areas for the VUCE. They include time and cost optimisation, unfinished protocols to release permits and duplicity of information.[7]

The legal basis for the VUCE is included in Legislative Decree 1211: which approves measures to strengthen the implementation of integrate public services through single windows and the exchange of information between public entities. This decree defines the rules for the implementation of single windows, the information exchange and the interoperability instruments. It indicates also that the adoption of these technologies can be gradual. Additionally, Law No. 28977: of exterior commerce facilitation (LFCE, *Ley de Facilitación de Comercio Exterior*) also makes reference to the VUCE.

Box 4.3. **E-Government strategies in Peru**

- Increase the available of government services to businesses and citizens through the use of IT and communication technologies, that allow for innovation of practices that simplify traditional administrative formalities.
- Develop a set of strategic projects that allow for the integration of key systems and institutions for the development of *E-Government* initiatives that impact in the short and medium term, permitting the adoption of new practices and creating emblematic projects of massive use.
- Improve the processes and formalities of the public administration to make them more efficient, transparent and focused on users, and facilitate its digitalisation through communication and IT technologies, considering the expectations and requirements of the citizen and the criteria of optimisation.
- Promote telecommunication infrastructure that fits the development of the *Information Society* and *E-Government*, in particular with emphasis in excluded zones.
- Generate capacities to the studentship, adult population and vulnerable groups in the use of IT, as part of their learning processes, for their insertion in the *Information Society*, and the general knowledge and *E-Government* in particular.

*Source:* Ministerial Resolution No. 274-2006-PCM.

## Measurement of administrative burdens

A practice that can contribute to a successful strategy on administrative simplification is the measurement of administrative burdens. With a measurement of burdens generated by government formalities, it is possible to undertake a simplification plan based on more robust evidence, set priorities to tackle the most burdensome regulations, and take advantage of the easy-to-understand nature of the burden reduction of formalities that can be expressed in monetary terms.

One of the most popular methodologies to measure and reduce administrative burdens that derive from formalities is the Standard Cost Model (the SCM). The Dutch Ministry of Finance developed the SCM as a quantitative methodology for determining the administrative burdens that regulation imposes on businesses. The SCM is usually popular across the political spectrum as it aims at removing formalities that are not necessary, but it does not entail changing the policy objectives of regulations.

The Standard Cost Model measures the consequences of administrative burdens for businesses. It provides a simplified, consistent method for estimating the administrative costs imposed on business by governments and provides estimates that are consistent across policy areas. The SCM can be applied to measure a single law, selected areas of

legislation or to perform a baseline measurement of all formalities in a country at different levels. The SCM is also suitable for measuring the administrative consequences of new formalities due to a new legislative proposal as well as administrative simplification proposals (see Box 4.4).

The main factors for the success of SCM have been a sound methodology for mapping and measuring administrative burdens and the possibility to set up a quantitative target for reduction. This target enables the creation of a benchmark against which progress can be measured. Such benchmark provides countries with fresh ideas for reducing burdens.

### Box 4.4. **The Standard Cost Model and administrative simplification**

The SCM methodology is an activity-based measurement of the businesses' administrative burdens, making it possible to follow the development of administrative burdens. At the same time, the results from the SCM measurements are directly applicable to governments' simplification work, as its outcome shows the specific regulation that is especially burdensome for businesses. The SCM goes beyond defining the cost of formalities as the fees paid by users. Instead, it allows for the calculation of administrative burdens by considering the time and money that citizens and business allocate to comply with the formality.

The SCM breaks down formalities into a range of manageable components that can be measured, while focusing on the administrative activities that must be undertaken in order to comply with regulation. SCM measurements highlight the existence of areas of regulation suitable for administrative burden reductions. Given the action-orientated nature of SCM results, it provides a crucial baseline and source of ideas for simplification opportunities.

The adoption of the SCM in the simplification process has several advantages:

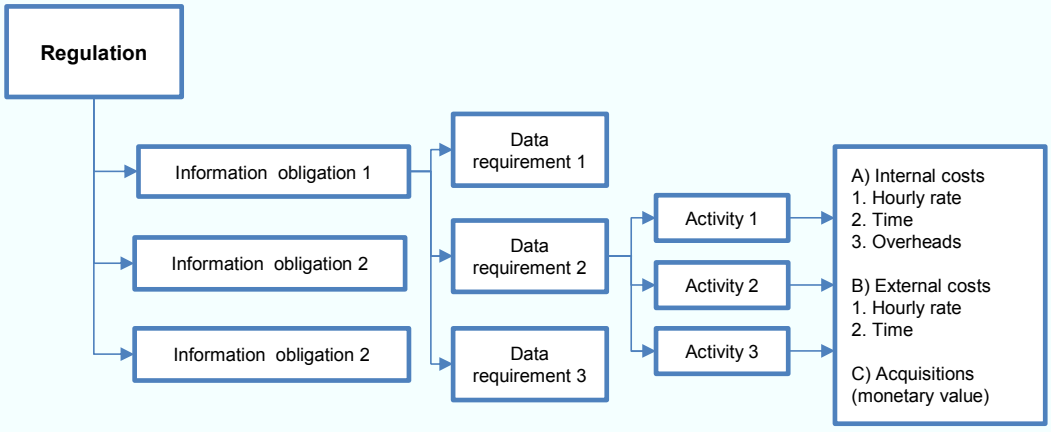
- It draws attention to the specific parts of the legislation that are most burdensome for businesses' compliance as well as identifying the total costs of administrative burdens;
- A baseline measurement reveals where administrative costs occur in business processes, highlighting where the greatest effect of simplification can be achieved;
- The classification of the causes for the administrative burdens and the identification of which department/ministry is responsible for burdensome regulation allows to target the simplification efforts;
- The collected information enables to simulate how changes or amendments in the regulation may impact on the costs faced by stakeholders, and;
- The SCM may also stimulate the share of data between government agencies.

According to the SCM there are three types of costs that businesses face due to the regulation: *Long-Term Structural Costs* and *Compliance Costs*. The latter is the cost category that the S category, the SCM takes into account the administrative costs of complying with the regulation v the regulatory burden.

The calculation of these costs is constructed through the monetisation of all the resources directed towards the development of information that is to be handed to the regulatory authorities.

The structure of the SCM goes as follows:

Box 4.4. **The Standard Cost Model and administrative simplification** (*cont.*)




*Source:* International SCM Network to Reduce Administrative Burdens (2004), *International Standard Cost Model Manual.*

The SCM is nowadays the most widely applied methodology for measuring administrative costs amongst OECD countries (see Box 4.5). However, in Peru, despite having a defined simplification strategy, no efforts to measure administrative burdens has been launched.

Box 4.5. **International experiences in the use of the SCM to measure administrative burdens**

Denmark has used the SCM to measure administrative burdens, and committed to a reduction of 25% between 2001 and 2010; while recently developing two new projects to address irritants and to match its burden reduction policy more closely to real business needs.

Germany chose the SCM to measure the administrative costs resulting from information obligations included in federal legislation. The target was to reduce administrative costs by 25% between 2006 and the end of 2011 as one of the cornerstones of its Bureaucracy Reduction and Better Regulation programme.

Sweden announced a national net reduction target of 25% by 2010 of business administrative costs stemming from compliance with information obligations in legislation, as defined by application of the SCM for measuring administrative burdens.

Portugal set up the objective to reduce administrative burdens on businesses by 25% by 2012. The goal was applicable to all laws, decree laws and decrees of national origin, which have an impact on the life cycle of businesses. It is based on an adapted version of the SCM and its selective application to key legislative and administrative simplification measures. The adjusted SCM includes full compliance costs and covers burdens for citizens. It focuses on information obligations and integrates delays and waiting times to capture the effects of e-government initiatives.

Box 4.5. **International experiences in the use of the SCM to measure administrative burdens** (*cont.*)

Finland adopted in 2009 one of the most recent programmes aiming at reducing administrative burdens on business by 25% by 2012, among other measures, following a pilot SCM measurement of VAT legislation. The action plan focuses on eight priorities: taxation; statistics; agricultural subsidisation procedures; food safety and quality; employers' reporting obligations; financial reporting legislation; public procurement; and environmental permit procedures. The development of e-government services for businesses is a horizontal priority of the action plan.

*Source:* OECD (2010), *Why Is Administrative Simplification So Complicated?: Looking beyond 2010*, Cutting Red Tape, OECD Publishing, Paris, pp. 20-22, http://dx.doi.org/10.1787/9789264089754-en.

## *Ex post* evaluation

In Peru, there is not a systematic *ex post* evaluation program of existing regulation. *Ex post* assessment of regulations has as one of their objectives to provide evidence about the results and impacts of the regulatory framework. Some efforts, however, are conducted by independent regulators in Peru, without being a constant practice (see Chapter 7). Additionally, the PCM makes evaluations of random samples of TUPAs to ensure that they comply with the legal requirements.

An important and fine effort is made by the Commission of Elimination of Bureaucratic Barriers (CEB, *Comisión de Eliminación de Barreras Burocráticas,*) of the INDECOPI. This commission has the legal capability of stopping the application of a regulatory instrument in concrete cases. When a rule is considered both a "bureaucratic barrier" and not legal, rational or proportionate, the CEB can stop its application (see Box 4.6).

Box 4.6. **The Commission of Elimination of Bureaucratic Barriers**

Once a rule is considered: a "bureaucratic barrier" – rules that affect the development of an economic activity – and as a result of the investigation of the CEB is also found to be:

- not legal: goes beyond the legal competences or does not meet the legal requirements, and or
- rational or proportionate: when it does not meet public interests or does not have a proper founding on a cost-benefit analysis, or does not represent the cheapest alternative;
- the CEB can rule the stopping of its application, which benefits all users in the case of rules established in regional or municipal ordinances supreme decrees, or ministerial resolutions; and in the case of other specific norms, it only benefits the requesting user.

Additionally, CEB can impose fines of up to PEN 78 000 to public agencies which:

- Demand additional information obligations different to the ones established in the Law No. 28976 Framework Law for Business License, and Law No. 29090 Law that Regulates Urban Housing and Edifications, or in regulations that replace or complement this ones;

Box 4.6. **The Commission of Elimination of Bureaucratic Barriers** (*cont.*)

- Request the payment of fees to users when submitting the formality that does not comply with the General Law of Administrative Procedure or the Lay of Municipal Taxes;
- Establish longer periods to issue the resolution for requests of licenses, permits and authorisations or for the delivery of implementation of infrastructure for public services established in the sections 2 and 3 of article 26BIS of the Law No. 25868;
- Apply the rule of silent is consent without meeting the requirements set in the Law No. 29060 Law of the Silent is Consent, or the regulation that replaces it;
- Demand information obligations that are prohibited according to articles 40 and 41 of the LPAG, amongst others.

In the case of investigation carried out by the CEB on its own initiative (see Table 4.2 below), once the ruling of the CEB has been upheld by the court, the resolution must be published in the official gazette "El Peruano". Then, any citizen can denounce an agency still applying the barrier, in which case the official in charge will be penalised. The objective is to discourage agencies to keep applying barriers that have been rules out as illegal, irrational or disproportionate.

The CEB has achieved the following results:

- Between June 2013 and April 2016, the CEB has pursued 1 150 investigation under its own initiative; 978 of these were linked to strategic sectors such as telecommunications, construction, and infrastructure of public services (distribution of electricity, natural gas and drinking water), and commercial activities;
- The Office of Economic Studies of INDECOPI estimated that an elimination of 21% of the barriers comprised in the 978 investigations mentioned above would convey a benefit of PEN 17 581 949 for the business previously affected.

*Source:* https://www.indecopi.gob.pe/web/eliminacion-de-barreras-burocraticas/informacion-util, last access on 11 of July 2016.

In order to initiate a case, the user must fill a format providing her details, the precise identification of the regulatory instrument which is alleged to be a barrier, the name of the public entity in charge of the barrier, the regulation containing it and the legal arguments regarding the illegality and no reasonability of the barrier, the facts that motivates the demand and confirmation of the statement of the complaint. The CEB can start a case of bureaucratic barriers by request of any citizen, or it can conduct cases by own initiative. According to public officials, the largest share of workload is originated by citizens' requests.

The process to consider any regulation as a barrier is indicated in the Legislative Decree No. 807 as follows. This process cannot last more than 120 working days (see Table 4.2).

The tasks of the CEB are relevant as they have the capacity to eliminate regulation which has no legal basis, either because it is contrary to any superior law, or because it is not proportionate to the objective. In summary, when the regulation creates a barrier, the commission can stop its application.

Table 4.2. **Procedure to declare a bureaucratic barrier**

| Complaint | Report of investigation |
|---|---|
| Admission examination | Start of procedure |
| Admission | Notification (5 days to deposition) |
| Notification (5 days) | Deposition (15 additional days) |
| Deposition (15 additional days) | Deposition |
| Rebellion | Verbal inform |
| Deposition | Resolution |

*Source*: Reproduction of the Unique Process published by INDECOPI.

## Assessment

***Inventories of laws, regulations and formalities are of difficult access, and there is not a single concentrated registry of them, which can create uncertainty to citizens and businesses as to the legal obligations required of them***

Citizens can find on the website of the Peruvian congress an updated list of primary laws in force. However, in the case of other legal instruments, such as supreme decrees – which are issued by the executive power – as well as other subordinate regulations, there is a repository but it is not of free access. The MINJUS has the website Peruvian System of Legal Information, which offers a basic service of free access with a compilation of the most relevant legal instruments, but access to the complete database requires payment of a fee.

The ministries and agencies of all levels of governments – central, regional and local – have the obligation to supply standardised information in printed form and on their websites of the formalities required by law for business and citizens. The Single Texts of Administrative Procedures (TUPAs) are often found in ministries' websites, and most of the times in hard copies in government offices which offer front line services. However, so far a single registry of TUPAs has not been developed yet, although a Legislative Decree ordering the construction of the Unique System of Formalities (SUT) has recently been issued and it is under implementation.

Moreover, the Secretariat of Public Management, part of the PCM, has acknowledged that it lacks the financial and human resources to perform an effective oversight of the TUPAs and oblige ministries to follow the guidelines set for their development and publication. As a result, the quality and type of the information of the TUPAs across ministries and agencies varies.

The lack of a single registry with information of quality for laws and regulatory instruments can be a source of uncertainty for businesses and citizens alike. This uncertainty can be exploited by public officials to their advantage, in detriment to entrepreneurial and business activity, and can affect negatively the experience and perception of citizens in the use of front line government services.

***Although a strategy for administrative simplification is in place, there is not an effective oversight of its implementation. These efforts are further diminished because the Peruvian government lacks a baseline of administrative burdens emanating from formalities and information obligations for business and citizens, which can make difficult to target resources and communicate results. Additionally, strategies for digitalisation of formalities and e-government services are still incipient and at early stages of development.***

The Secretariat of Public Management has issued a methodology on administrative simplification and procedures for the National Government, Regional Governments and Local Governments, which offers instructions to ministries and agencies of the three levels of government to eliminate information requirement, reduce response times, and other strategies aimed at reducing burdens from formalities and information obligations for citizens and businesses. This has been coupled with the release of a national strategy on modernisation of the public administration, a national plan on administrative simplification, and an implementation strategy. However the implementation strategies, and the evaluation of results and impacts of simplification, have not been enforced. The Secretariat of Public Management does not seem to have the financial and human resources to carry out these activities, and also lacks the regulatory framework to carry out an effective oversight function. The need to address these shortcomings becomes more pressing in the face of the publication of the legislative decree that creates that SUT.

Additionally, no measurement of administrative burdens for business and citizens coming from formalities has been carried out, so a baseline measurement is not available. This limits the capacity of the Peruvian government to target scarce public resources on the most burdensome formalities, and on its ability to assess the benefits of alternative strategies that can be as effective at reducing burdens, such as applying citizen language, increasing the quality of template and submission forms, as well as digitalisation and other e-government strategies. It also reduces the capacity of the government to communicate more effectively the results of the simplification strategies, which can ensure continuous support for this type of initiatives and contribute to eliminate the resistance of ministries and agencies.

Finally, an agenda to make available on line formalities or public services for citizens as part of an e-government strategy has not been implemented.

***The contribution of the Commission for the Elimination of Bureaucratic Barriers to reduce administrative burdens from formalities and provide legal certainty can be enhanced***

The Commission for the Elimination of Bureaucratic Barriers, part of INDECOPI, has the legal capacity to assess the regulatory framework of Peru, which includes the mandate to attend the public´s complaints on formalities and information obligations that go beyond the legal framework, or which are not "justified". In case the complaint is valid, the Commission can request the ministry or agency sponsoring the formality to stop requiring specific information or stop demanding the formality altogether. After an administrative and legal procedure, this request can become legally binding. The commission can also start investigations of the same nature on its own. The Commission can perform these tasks for formalities required by the three levels of government.

However, these capacities are bound by the fact that the Commission does not have legal mandate to carry out a systematised evaluation of formalities or a baseline measurement to develop a specific strategy for burden reduction, as part of a larger policy on administrative simplification and *ex post* analysis of the regulation, nor does seem to have the resources to carry such a programme. The baseline could include first a definition of which rules can be considered a bureaucratic barrier first, and then an assessment of their legality, rationality and proportionality.

Additionally, the commission's capacity for evaluation and of "pointing fingers" can be restrained by the fact that it is an office within an agency (INDECOPI) in which the independence of its decisions can be undermined by political objectives.

### *No evidence was found that Peru carries out ex post evaluation of laws or regulations in force*

From a regulatory governance perspective, in which regulations follow a ¨life-cycle" approach which includes the stages of *ex ante* assessment and compliance and enforcement, the *ex post* evaluation of whether regulations in force effectively and efficiently address the policy problem represent a building block for an effective regulatory policy. It is only after implementation that the effects and impacts of regulations can be fully assessed, including direct and indirect incidence and unintended consequences.

During the interviews and after reviewing the supporting documents provided by Peruvian officials, no evidence was found that Peru carries out *ex post* evaluations of laws or regulations in force. The only exception identified was the investigations carried out by the Commission for the Elimination of Bureaucratic Barriers, but they focus only on assessing the legal validity or "reasonable justification" of existing formalities or of data requirements demands as part of formalities, rather than evaluating whole pieces of legislation, regulatory instruments, or regulation affecting specific economic sectors.

## Key recommendations

- Create a central online and free access registry of laws, and other regulatory instruments, which is complete and up to date. Establish a similar central and online registry of TUPAs in which the quality and amount of information is ensured and up to date. The recent publication of the Legislative Decree which creates the Single System of Formalities (SUT) goes in this direction and should be implemented fully. Ministries and agencies of the three levels of government should be obliged to feed the system with the supervision of the oversight body to keep the registries up to date, including the addition of new formalities, as a result of new regulations. The new formalities and regulation should go through the RIA process, in which administrative simplification criteria have to be applied to the new formalities (see Box 4.7 below for an international example).
- Ensure the full implementation of the policies of administrative simplification, which should include evaluation of the impacts. Appropriate resources to carry out these tasks should be contemplated. In the framework of the Coordinating Council on Regulatory Policy, the implementation of these policies should be followed up, assessed and improved.

### Box 4.7. **Procedures and services register in Mexico**

As an effort on digital government, Mexico has developed a centralised platform that includes the information of every procedure and service. In its website www.gob.mx, procedure and services are categorised by topics (e.g. Health, Social Programs, Labour, Migration and so forth). The information presented in this Register includes: i) required documents; ii) costs; iii) options for conducting the process (attendance, online etc.); 4) a map to find the nearest office. Although many Mexican states and municipalities have their own register, this federal effort has also the goal of the inclusion of subnational registers. This way the users may find every service and procedure regardless of the level of government. Having a digital platform does not only makes it easier for the citizen to find the pertinent regulations, but it is also a tool ensure the continuous actualisation of the register.

*Source*: www.gob.mx (accessed 10 April 2016).

- Carry out a measurement of administrative burdens of formalities and information obligations. As an alternative to a full baseline, the formalities for the most relevant economic process or the formalities for priority sectors can be measured first, and a strategy in stages can be developed further on. Based on these results, the efforts on administrative simplification can be targeted and focused in order to ensure the achievement of defined goals (see Box 4.8 for an international example).

### Box 4.8. **Administrative Burdens Reduction Programme in the Netherlands**

During 2003-07, the Dutch government carried out a regulatory reform project aimed in reducing administrative barriers. Netherlands aimed to reduce 25% of the regulatory costs its government had on businesses, translating into approximately EUR 4 billion. An OECD assessment of the program identified several best practices of Netherlands that may be extrapolated for this type of projects:

- **Measurement:** A method for measuring the total administrative burden and for mapping the distribution of burdens on individual regulations and ministries has been developed. This Standard Cost Model (SCM), which has been taken up by a high number of countries and the European Commission, enables a targeting of simplification efforts for the most burdensome regulations and makes it possible to monitor the development of overall administrative burdens.
- **Quantitative target:** By establishing a quantitative, ambitious and time-bound target, and communicating this widely, the government accepted to be held accountable on a highly prioritised policy goal. The target has been divided among ministries and over years, thus providing a strong instrument for steering and monitoring simplification efforts across the administration.
- **Strong co-ordinating unit at the centre of government:** The inter-ministerial project team (IPAL), located in the Ministry of Finance, provided a coherent co-ordination of the programme across ministries. IPAL ensured methodological consistency, common and co-ordinated reporting and use of instruments such as risk assessment to increase the likelihood of successful implementation of the many initiatives to simplify the regulatory framework.

Box 4.8. **Administrative Burdens Reduction Programme in the Netherlands** (*cont.*)

- **Independent monitoring:** The Advisory Board on Administrative Burdens (Actal) played the role of independent watchdog, monitoring progress towards meeting the reduction target and assessing the initiatives of individual ministries. Actal assisted in guiding and advising ministries and provided independent and horizontal advice to the Cabinet on ways and means to strengthen the programme. From the outset, the possibility of abandoning the programme in times of difficulty was removed, or at least made very costly. This independent body contributed to ensure sustained attention and support for the programme.
- **Link to the budget cycle:** Reporting to Cabinet and Parliament on plans for and progress on the burden reduction programme has been linked to well-established reporting procedures related to the budget. This led to unavoidable deadlines for reporting and ensured recurring attention from the Cabinet and Parliament. It also made clear to ministries that performance on the programme would be of relevance in budget discussions with the Ministry of Finance and its minister.
- **Political support:** The programme for the reduction of administrative burdens has had clear and sustained political support from the Cabinet, expressed from in the Coalition Agreement and onwards.

*Source*: OECD (2007), *Administrative Simplification in the Netherlands*, Cutting Red Tape, OECD Publishing, Paris, http://dx.doi.org/10.1787/9789264037496-en.

- Consider granting the Commission for the Elimination of Bureaucratic Barriers more independence, including a scheme for a more independent decision-making process and governing body, so it can discharge its functions more effectively. This should be coupled with the establishment of proper arrangements for accountability and transparency.
- The resolutions of the Commission of Bureaucratic Barriers should be investigated further by the Coordinating Council on Regulatory Policy, in order to assess whether this council should take further action to promote the modification or elimination of the source regulation that created the citizen complaint in the first place.
- As part of Peru´s regulatory policy, consider establishing a programme on *ex post* evaluation of regulation. The program should define specific criteria for the selection of laws or regulation to asses, the periodicity of evaluation, guidelines of evaluation, and should set the necessary provisions for the Coordinating Council on Regulatory Policy to promote modifications on the regulatory framework as part of this assessment (see Box 4.9 for an international example).

### Box 4.9. *Ex post* review typology

The Productivity Commission of Australia issued a research report that lists a number of good design features for each review approach which help ensure that they work effectively, drawn from Australian and international good practices. The Commission considered the following main approaches:

**Stock management approaches** (have an ongoing role that can be regarded as "good housekeeping"):

- *Regulator-based strategies* refer to the way regulators interpret and administer the regulations for which they are responsible – for instance through monitoring performance indicators and complaints, with periodic reviews and consultation to test validity and develop strategies to address any problems. Ideally, the use of such mechanisms is part of a formal continuous improvement programme conducted by the regulator.
- *Stock-flow linkage rules* work on the interface between *ex ante* and *ex post* evaluation. They constrain the flow of new regulation through rules and procedures linking it to the existing stock. Although not widely adopted, examples of this sort are the "regulatory budget" and the "one-in one-out" approaches.
- *Red tape reduction targets* require regulators to reduce existing compliance costs by a certain percentage or value within a specified period of time. Typically, they are applied to administrative burdens reduction programmes.

**Programmed review mechanisms** (examine the performance of specific regulations at a specified time, or when a well-defined situation arises):

- *Sunsetting* provides for an automatic annulment of a statutory act after a certain period (typically five to ten years), unless keeping the act in the books is explicitly justified. The logic can apply to specific regulations or to all regulations that are not specifically exempted. For sunsetting to be effective, exemptions and deferrals need to be contained and any regulations being re-made appropriately assessed first. This requires preparation and planning. For this reason, sunsetting is often made equivalent to introducing review clauses.
- *"Process failure"* post implementation reviews (PIR) (in Australia) rest on the principle that *ex post* e valuation should be performed on any regulation that would have required an *ex ante* impact assessment. The PIR was introduced with the intention of providing a "fail-safe" mechanism to ensure that regulations made in haste, without sufficient assessment or diverging from best practice – and therefore having greater potential for adverse effects or unintended consequences – can be re-assessed before they have been in place too long. An exemption from the PIR requirements can only be obtained when the regulation is no longer in force or no longer government policy.

Through *ex post* review requirements in new regulation, regulators outline how the regulation in question will be subsequently evaluated. Typically, this exercise should be made at the stage of the preparation of the RIA. Such review requirements may not provide a full review of the regulation, but are particularly effective where there are significant uncertainties about certain potential impacts. They are also used where elements of the regulation are transitional in nature, and can provide reassurance where regulatory changes have been controversial.

Ad hoc and special purpose reviews (take place as a need arises):

### Box 4.9. ***Ex post*** **review typology** (*cont.*)

- *"Stocktakes"* of burdens on business are prompted or rely on business' suggestions and complaints about regulation that imposes excessive compliance costs or other problems. This process can be highly effective in identifying improvements to regulations and identifying areas that warrant further examination, but their very complaint-based nature might limit the scope of the review.
- *"Principles-based"* review strategies apply a guiding principle being used to screen all regulation for reform – for instance removal of all statutory provisions impeding competition (unless duly justified), or the quest for policy integration. Principles-based approaches involve initial identification of candidates for reform, followed up by more detailed assessments where necessary. Approaches of this kind are accordingly more demanding and resource-intensive than general stocktakes. But if the filtering principle is robust and reviews are well conducted, they can be highly effective.
- *Benchmarking* can potentially provide useful information on comparative performance, leading practices and models for reform across jurisdictions and levels of government. Because it can be resource-intensive, it is crucial that topics for benchmarking are carefully selected. Benchmarking studies do not usually make recommendations for reform, but in providing information on leading practices they can assist in identifying reform options.
- *"In-depth"* reviews are most effective when applied to evaluating major areas of regulation with wide-ranging effects. They seek to assess the appropriateness, effectiveness and efficiency of regulation – and to do so within a wider policy context, in which other forms of intervention may also be in the mix. In the Australian context, extensive consultation has been a crucial element of this approach, including through public submissions and, importantly, the release of a draft report for public scrutiny. When done well, in-depth reviews have not only identified beneficial regulatory changes, but have also built community support, facilitating their implementation by government.

*Source*: Australian Productivity Commission (2011), "Identifying and Evaluating Regulation Reform, Research Report", Canberra, www.dpmc.gov.au/sites/default/files/publications/017_Post-implementation_reviews_1.pdf (accessed 5 April 2016).

# Notes

1. www.leyes.congreso.gob.pe/Inicio.aspx.
2. http://spij.minjus.gob.pe/.
3. User Manual of the SPIJ, http://spij.minjus.gob.pe/manuales/ManualUsuario.pdf.
4. www.peru.gob.pe/transparencia/pep_transparencia.asp.
5. Approved through Supreme Decree No. 004-2013-PCM.
6. As part of this strategy, Component I "The Improvement of regulatory processes and inspection across the life cycle of enterprises" include as goal the adoption of RIA in the creation or modification of norms and formalities linked with licensees, authorisations and permits. The RIA adoption is recognised in the document as one of the most important tools for regulatory improvement.
7. IADB, "Improving trade facilitation services through the one-stop for foreign trade (VUCE) in Peru", PE-L1159, http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=39469414 (accessed 14 July 2016).

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*Chapter 5*

# Compliance and enforcement of regulation in Peru

*This chapter discusses the approaches applied by the Government of Peru to advance regulatory enforcement and compliance. The institutional arrangements and practices across enforcement agencies vary widely, yet some commons treads are found. There is no general policy on regulatory compliance and enforcement across government agencies. Peru should include the policy of inspections and enforcement of regulations as an integral part of its regulatory policy, and should include general guidelines relating to horizontal objectives such as ethical behaviour, organisation and planning of inspections, and transparency towards the subjects of inspections.*

Regulation is a key tool for achieving the social, economic and environmental policy objectives of governments. Governments have a broad range of regulatory schemes reflecting the complex and diverse needs of their citizens, communities and economy. Ensuring effective compliance with rules and regulations is an important factor in creating a well-functioning society and trust in government. If not properly enforced, regulations cannot effectively achieve the goals intended by the governments. Regulatory enforcement is therefore a major element in safeguarding health and safety, protecting the environment, securing stable state revenues and delivering other essential public goals. Inspections are the most visible and important among regulatory enforcement activities.

## Legal and institutional framework

This section describes the framework that underpins the work done by Peruvian authorities to advance regulatory enforcement and compliance. In particular, it focuses on the general legal and institutional settings within the executive, as well as the general organisation of enforcement and inspection functions (see Box 5.1).

### Box 5.1. **Definition of some key terms in enforcement and inspections**

In this paper, "enforcement" will be taken in its broad meaning, covering all activities of state structures (or structures delegated by the state) aimed at promoting compliance and reaching regulations' outcomes – e.g. lowering risks to safety, health and the environment, ensuring the achievement of some public goods including state revenue collection, safeguarding certain legally recognised rights, ensuring transparent functioning of markets etc. These activities may include: information, guidance and prevention; data collection and analysis; inspections; enforcement actions in the narrower sense, i.e. warnings, improvement notices, fines, prosecutions etc. To distinguish the two meanings of enforcement, "regulatory enforcement" will refer to the broad understanding, and "enforcement actions" to the narrower sense.

"Inspections" will be understood as any type of visit or check conducted by authorised officials on products or business premises, activities, documents etc.

From the perspective of this paper, "regulatory enforcement agencies", "inspecting agencies" or "inspectorates" are all essentially synonymous (as in practice there is fluidity in the way they are called in various countries). The preferred wording adopted generally in the paper will be "regulatory enforcement agencies".

*Source:* OECD (2014), *Regulatory Enforcement and Inspections*, OECD Best Practice Principles for Regulatory Policy, OECD Publishing, Paris, http://dx.doi.org/10.1787/9789264208117-en.

Whilst adoption and communication of a law sets the framework for achieving social, economic and environmental policy objectives, effective implementation, compliance and enforcement are essential for actually meeting these objectives. Compliance with regulations is in the first instance the responsibility of citizens and businesses. However, the delivery of regulatory outcomes cannot be effective without a proper enforcement of regulations. Regulatory enforcement is therefore a major element in safeguarding health and safety, protecting the environment, securing stable state revenues and delivering other essential public goals. Inspections are one of the most important ways to enforce regulations and to ensure regulatory compliance (OECD, 2014).

In Peru, according to Article 23 of the Organic Law of the Executive Branch (LOPE), line ministries have among their duties the obligation to "comply with and enforce the regulatory framework related to their field of competence, exerting the appropriate

sanctioning authority". Therefore, ministries, such as the Ministry of Communications and Transport, and the Ministry of Health, have enforcement and inspection units to perform these tasks.[1]

Apart from line ministries other public entities that include Economic Regulators such as OSIPTEL (telecommunications) or OSINERGMIN (energy); Specialised Technical Organisations, such as OEFA; and some *Superintendencias* such as the Supervisory Agency for Labour Oversight (SUNAFIL) or the Superintendence of Banking, Insurance and Private Pension Fund Administrators (SBS), also have oversight, control, and enforcement functions. The legal status, degree of independence, budget and other characteristics vary across these entities, just as their enforcement practices do (see Section *Tools and practices*). A clear example is the SBS, which is a constitutionally autonomous institution, organised under public law, which purpose is to protect the interests of the public in the fields of the financial, insurance private pensions systems, and it has the same public regime as the Central Bank of Peru.

Regional and local governments also have enforcement and inspection responsibilities. This chapter does not, however, assess the enforcement functions of regional and local governments which are analysed in Chapter 6.

For the purpose of this report, the classification in Table 5.1 of inspectorates assessed in this report is made to describe and assess the practices of enforcement and inspection in Peru. There are other many other inspectorates in Peru, but for practical matters only a sample of them were included in this report. Care was taken to have in the sample a wide breadth of institutional design and practices.

Amid this diverse set of institutions with enforcement functions, in Peru there is no general policy on regulatory compliance and enforcement across government agencies. In general each institution has its own legal framework and its own set of enforcement practices developed over the years.

Table 5.1. **Classification of inspectorates assessed as part of this report**

| Inspectorates within line ministries | Inspectorate agencies with a larger degree of independence |
|---|---|
| General Directorate of Environmental Health and Food Safety, Ministry of Health | Agency for Environmental Assessment and Enforcement (OEFA) |
| General Directorate of Medicines, Inputs and Drugs, Ministry of Health | National Institute for the Defence of Free Competition and Protection of Intellectual Property (INDECOPI) |
| Several inspectorates inside the Ministry of Transport | National Superintendence of Customs and Tax Administration (SUNAT) |
| | National Superintendence of Sanitation Services (SUNASS) |
| | Superintendence of Banking, Insurance and Private Pension Fund Administrators (SBS)[1] |
| | Supervisory Agency for Investment in Public Transport Infrastructure (OSITRAN) |
| | Supervisory Agency for Persons, Cargo and Goods Road Transport (SUTRAN) |
| | Supervisory Agency for Private Investment in Telecommunications (OSIPTEL) |

1. Constitutionally autonomous body.

For all inspectorates except for the SBS, besides Article 23 of LOPE, the only common legal foundation is the General Administrative Procedure Law (LPAG) that regulates the way in which public administration entities interact with the public at large, through the establishment of uniform standards and principles governing all administrative acts including enforcement and inspection decisions. For instance, the LPAG sets general rules as to how to undertake administrative procedures, the use of silent is consent or non-consent rule, appeal mechanisms with regard to administrative decisions, and the determination of sanctions. This framework, however, is too general given that it is not aimed specifically at enforcement and inspection procedures.

Therefore, it may be said that there are as many regulatory frameworks for undertaking enforcement/inspection activities in Peru as there are enforcement agencies. Each of them has its own legal foundation and internal rules on how to implement them.

Line ministries have a legal foundation in their sectoral regulations that gives them the specific legal basis to undertake enforcement/inspection activities. For example, the Civil Aviation Law in the Ministry of Communications and Transport, or the General Health Law and the Law on Pharmaceutical Products, Medical Devices and Sanitary Products in the Ministry of Health.

In terms of organisation, inspectorates within line ministries normally have a rank of directorate (or lower) and are under the umbrella of a general directorate. For instance, within the General Directorate for Environmental Health in the Ministry of Health, there is the Directorate for Inspection on Environmental Health and Animal Safety. In some ministries such as the Ministry of Communications and Transport, some areas, e.g. railways, may have enforcement/inspection functions whereas for other areas these functions are shared with or exercised by more independent regulators such as the transport regulator (SUTRAN) and the Infrastructure regulator (OSITRAN). In any case, each inspectorate has its own rules to undertake inspections which are sometimes formalised through manuals, guidelines or internal regulations, but whose application is not necessarily supervised.

Independent enforcement agencies (other than economic regulators) also have their own legal framework. Most of these agencies were created by law in different sectors or policy areas such as the environment (OEFA) or the financial sector (SBS), and under different institutional arrangements. For instance, in the case of the SBS tits framework is set in the Law 26702 Text of General Law of the Financial and Insurance Systems and Organic Law of the Superintendence of Banking and Insurance. Given their technical nature, they are able to better concentrate on their regulatory and/or enforcement functions. Accordingly, new enforcement agencies tend to have a different vision of enforcement activities and inspections, which is to some extent more in line with international practices (see Section *Tools and practices* below).

## Capacities to undertake inspections

This section reviews the existing capacities of Peruvian authorities to undertake inspections and ensuring effective compliance with regulations. The focus of the analysis is on the availability of human and material resources.

Enforcement activities not only create burdens for businesses and citizens but also involve administrative costs for public agencies. The challenge for governments is to develop and apply enforcement strategies that achieve the best possible outcomes by attaining the highest possible levels of compliance, while keeping the costs and burden as

low as possible (OECD, 2014). Keeping government costs as low as possible, however, requires effective and efficient enforcement and inspection agencies, which in turn requires assuring a minimum of human and material resources and capacities for implementing inspections.

### *Human resources*

Creating and keeping a high quality professional base of enforcement agents is essential to ensure effective inspections and enforcement, and regulatory compliance. Governments should therefore adopt human resources management plans for regulatory enforcement agencies and personnel. These plans should include training and development of competencies, performance and evaluation guidelines, and compensation schemes, among other elements.

By law, public entities in Peru must have human resources management plans; however, they tend to be comprehensive and thus are not focused on the enforcement/inspections functions. For instance, the Ministry of Health has an Annual Personnel Development Plan which integrates the needs and requirements of all the different areas of the ministry, including those with enforcement functions. Nevertheless, given that budgets are limited it is not clear how these needs and requirements are weighted overall. Moreover, these plans tend to focus mostly on training needs and don't take into account other elements such as compensation schemes that normally have an impact on career development. As a result, enforcement agencies, in particular line ministries do not have human resources management plans tailored to the needs (and future needs) of their enforcement and inspections duties.

Independent enforcement agencies tend to suffer less from these difficulties. In the one hand because they are not under the direct authority of a line ministry, which gives them more leeway to tailor their human resources management plans; and on the other because for some of them such as OEFA or SUNAFIL their main mandate is regulatory enforcement, and therefore tend to adopt specific practices. For example, average monthly salaries tend to be higher for inspection officers in independent agencies (PEN 6 300 in OEFA, and PEN 8 000 in SBS) compared to those in line ministries (PEN 4 500 in the Ministry of Health).[2] Independent agencies also make use of third party inspectors (outsourcing to the private sector) whereas this is not the case in line ministries.

Another problem with inspectorates within line ministries is their lack of co-operation and exchange of experiences, in particular in the terms of human resources management. For instance, there are five different inspectorates in the Ministry of Health and there is almost no communication, co-ordination, or exchange of information or experiences among them.[3] This illustrates how inspection policies and practices are not only sector specific or institution specific, as there might be as many policies and practices as there are inspectorates.

### *Material/financial resources*

Undertaking inspections and enforcement activities carries a cost for public authorities, not only in terms of staff, training and premises, but also in the form of paperwork, equipment, information management, etc. So it is important that enforcement agencies do have the necessary resources to perform their task.

In Peru, enforcement agencies are normally endowed with funds from the government budget; however, these funds are often deemed to be insufficient to carry out their enforcement/inspection responsibilities. Here again, this is less of a problem for independent enforcement agencies who usually have a second source of funds through the contribution for regulation (*Aporte por Regulación*), which are charges from regulated subjects.

The following comparison illustrates the differences in the general budgets allocated to enforcement/inspection activities. Whereas four inspectorates (out of five) of the Ministry of Health reported a combined budget of almost PEN 4 million (PEN 3 928 850) in 2015, the OEFA reported over PEN 100 million (PEN 101 338 060) and the SBS had more than PEN 150 million (PEN 150 406 320) for the same period.[4]

As in other fields, the use of Information and Communication Technologies (ICTs) has also become a very useful tool for enforcement/inspection processes. Efficient processes must have data collection mechanisms and systems to ensure data quality and its continuous updating. For example, these systems can help monitoring compliance of those under the jurisdiction of the enforcement/inspection agency compiling information on where they are and the history of the results of past visits. Systems of information management may help as well to integrate online databases and mechanisms for gathering information in a systematic and timely manner; integrate databases that allow the selection of individuals/businesses to be controlled, scheduling inspection visits, the allocation of resources based on risk criteria, monitoring of results, assessment of inspectors performance, etc.; and provide public information on the risk of the sector and the company.

In Peru, many enforcement agencies still work without automated information management systems, in particular those within line ministries. Although some of them are in the process of developing or acquiring such systems, it is often the case that they rely on more traditional methods or on systems useful for some tasks but not fit for a comprehensive management of the enforcement/inspection process. Independent enforcement agencies are better equipped, although it is difficult to assess the operation of their systems.

## Capacities for implementing inspections

Effective enforcement requires in addition to having the technical and inspection skills, the necessary staff to control the subjects to the regulation and improve compliance. One recurrent complaint is that inspectorates don't have enough personnel to undertake all the necessary inspections they have to. Although this is in part due to the fact that they often lack targeting strategies and selection criteria such as risk based inspections, it is also true that they are often understaffed, in particular within line ministries.

There is of course no an absolute number of staff required for undertaking inspections, as this is a function of the regulation itself, the universe of subjects to the regulation, enforcement approach, inspection strategies, risks involved, amongst other elements. However, authorities must make sure that inspectorates have the necessary staff to implement inspections and ensure compliance. One way to do this is through a system of indicators (information management system) allowing to assess performance of inspectors and of inspection units in terms of inputs, outputs, and outcomes.

Some inspectorates also made reference to the poor performance of regional and local level inspections. For instance, the Direction for Drug Enforcement from the Ministry of Health mentioned that in some regions sanctions had never been imposed or that drug warehouses from the public sector had never been controlled or inspected, all this due to the lack of capacities.

In this sense, independent enforcement agencies such as OEFA, SUNAFIL, in addition to their more focused vision of enforcement/inspections, they are in general better endowed and equipped, and as a result have better capacities to undertake inspections.

## Tools and practices

This section reviews the tools and practices used by enforcement agencies in Peru. In particular it focuses on inspection procedures, the general approach to inspections, complaint and co-ordination mechanisms, and performance evaluation.

As mentioned in *Section Legal and institutional framework* the lack of cross-sectoral policies on enforcement and regulatory compliance in Peru has given rise to an array of enforcement agencies, governance arrangements and inspection practices. Moreover, each enforcement agency has its own set of tools and enforcement practices.

### *Inspection process*

Enforcement/inspection activities may normally be seen as a process which is undertaken according to a series of steps. In general terms, these steps are:

1. the selection of the individuals or businesses that will be inspected;
2. carrying out the inspection *in situ*;
3. imposition of sanctions in case of non-compliance.

The effectiveness and efficiency of regulatory enforcement depends on the tools and procedures used during each step of the inspection process. Enforcement agencies in Peru follow formally or informally these steps; however, the tools and practices used therein do not in general abide by principles on which effective and efficient regulatory enforcement and inspections should be based (see Box 5.2).

#### *Selection of the individuals or businesses that will be inspected*

One of the most important decisions of enforcement agencies is to select individuals that will be monitored through an inspection. Given that governments have limited resources, they cannot inspect each and every individual under supervision, and therefore need decision criteria to select those individuals that will be inspected. In recent years one of the most important reforms to enforcement and inspection systems has been to help make these decisions based on an analysis of the risks involved, i.e. risk-based inspections (see Principle 3 in Box 5.2).

Risk-based inspections, however, are not the rule among enforcement agencies in Peru, in particular within line ministries. Although most inspectorates develop annual work plans that guide their inspection activities, these work plans do not necessarily integrate risk analysis. They sometimes use criteria such as inspecting a percentage, say 10%, of the files or individuals on their records or, depending on the size of the universe of individuals or businesses to be monitored, they inspect them all at least once or twice a year; finally, they also carry out inspections when there is a complaint from a third party.

### Box 5.2. **International best practice principles: improving regulatory enforcement and inspections**

Based on expert papers, an extensive review of practices in OECD and non-OECD countries and on research conducted on this topic over the past three decades, the OECD presented some key principles on which effective and efficient regulatory enforcement and inspections should be based in pursuit of the best compliance outcomes and highest regulatory quality. The principles address the design of the policies, institutions and tools for promoting effective compliance – and the process of reforming inspection services to achieve results.

1. **Evidence-based enforcement**. Regulatory enforcement and inspections should be evidence-based and measurement-based: deciding what to inspect and how should be grounded on data and evidence, and results should be evaluated regularly.
2. **Selectivity**. Promoting compliance and enforcing rules should be left to market forces, private sector and civil society actions wherever possible: inspections and enforcement cannot be everywhere and address everything, and there are many other ways to achieve regulatory objectives.
3. **Risk focus and proportionality**. Enforcement needs to be risk-based and proportionate: the frequency of inspections and the resources employed should be proportional to the level of risk and enforcement actions should be aiming at reducing the actual risk posed by infractions.
4. **Responsive regulation**. Enforcement should be based on "responsive regulation" principles: inspection enforcement actions should be modulated depending on the profile and behaviour of specific businesses.
5. **Long term vision**. Governments should adopt policies and institutional mechanisms on regulatory enforcement and inspections with clear objectives and a long-term road-map.
6. **Co-ordination and consolidation**. Inspection functions should be co-ordinated and, where needed, consolidated: less duplication and overlaps will ensure better use of public resources, minimise burden on regulated subjects, and maximise effectiveness.
7. **Transparent governance**. Governance structures and human resources policies for regulatory enforcement should support transparency, professionalism, and results oriented management. Execution of regulatory enforcement should be independent from political influence, and compliance promotion efforts should be rewarded.
8. **Information integration**. Information and communication technologies should be used to maximise risk-focus, co-ordination and information-sharing – as well as optimal use of resources.
9. **Clear and fair process**. Governments should ensure clarity of rules and process for enforcement and inspections: coherent legislation to organise inspections and enforcement needs to be adopted and published, and clearly articulate rights and obligations of officials and of businesses.
10. **Compliance promotion**. Transparency and compliance should be promoted through the use of appropriate instruments such as guidance, toolkits and checklists.
11. **Professionalism**. Inspectors should be trained and managed to ensure professionalism, integrity, consistency and transparency: this requires substantial training focusing not only on technical but also on generic inspection skills, and official guidelines for inspectors to help ensure consistency and fairness.

*Source*: OECD (2014), *Regulatory Enforcement and Inspections*, OECD Best Practice Principles for Regulatory Policy, OECD Publishing, Paris, http://dx.doi.org/10.1787/9789264208117-en.

There are exceptions to this rule, for instance the Inspectorate for Food Hygiene normally focuses its work on controlling foods with a higher level of risk and consumption according to the season of the year; they also inspect food processing plants depending on the risk that the product represents for human consumption. Likewise, other inspectorates, in particular independent enforcement agencies increasingly incorporate risk analysis. For instance, OEFA uses a combined approach whereby they focus on activities or stages of the productive process that can potentially harm more the environment and on those environment components (soil, air, water, etc.) that are more at risk due to the activities of the firms supervised. Another example is SBS, which has also adopted oversight criteria based on risks and international standards.

It is important to note that the development of inspection systems based on risk in a growing number of countries has been made possible not only by the adoption of a more rational approach, but also through the use of ICTs, as well as information management systems, which in many enforcement agencies in Peru is a pending task (see Principle 8).

### *Carrying out the inspection in situ*

In many emerging economies an important part of regulatory costs stems from the sometimes excessive and uncontrolled discretion that creates opportunities for inspectors during a visit, which can lead them to abuse their mandate and power and even be tempted to engage in illegal or corrupt acts. It is therefore important that procedures, rights and obligations to carry out an inspection are clear and known to those being inspected. To accomplish this, the authority must publish the detailed procedures in a simple and accessible manner, covering every step of the inspection process. The procedures must be supported by precise legal requirements, and in particular detail the processes that inspectors must follow. Similarly, and beyond the guidance for inspectors, the authority must also establish procedures that allow filing a complaint or appeal against excessive discretion by inspectors during the visit (see Principle 9).

In Peru it is commonplace across enforcement agencies to have some sort of directives or guidelines for inspections *in situ*, which may take an array of different forms such as rules, protocols, instructions, technical manuals, guidelines, amongst others. However, a number of key problems with these directives have been identified.

One major problem with these directives is that they are often informal (i.e. they have not been officially approved by the institution, for instance they have not bun published in the official gazette *El Peruano*) which makes their application questionable, optional and discretionary. Even when they have been formally approved, it is sometimes difficult for the public to get hold of them and thereby to be aware of how inspections will occur and their rights and obligations during the inspection process.[5]

Another important problem is that these directives are too general and therefore do not cover the whole inspection process or they do it without the necessary detail, creating important loopholes and opportunities for misbehaviour by inspectors. For instance, the use of inspection checklists with the legal requirements to be inspected is not a common practice. Moreover, no evidence was found that in these rules and guidelines a prominent place is given to practices and tools designed to prevent corruption, regulatory capture and the promotion of transparency.

Another area of concern is that these directives rarely take into account the perspective of those being inspected and thus do not make explicit their rights or set out complaint mechanisms which can be used in case of need. Finally, although an inspection

report is normally prepared during the inspection, a copy of the report is not necessarily given to the subject of the inspection at the end of the visit.[6]

### *Imposition of administrative sanctions in case of non-compliance*

Sanctions are meant to act as a deterrent to non-compliance; however, they might become a serious problem if they are set by the inspector or enforcement agency without previously communicating the criteria for such penalties.

In Peru, sanctions are normally prescribed by law, so the role of enforcement agencies is to determine the level of sanctions or penalties according to the infraction committed and following a sanctioning procedure, which is regulated by the LGPA or by other sectoral laws. Having a framework procedure for the imposition of sanctions is a welcome development as it sets a minimum "due process" standard; however, it is not enough to understand the criteria or the factors taken into account when imposing a sanction.

Guidelines or manuals setting out in a transparent manner how they determine the sanctions they impose is yet a practice not adopted by all enforcement agencies.[7] For instance, under the sanctioning procedure, before the imposition of sanctions, the authority has the obligation to hear and receive a defence statement from the defendants, but it is not clear how this statement is taken into account and how it influences the level of the sanction. In the same line, with limited cases such as in the SBS, no evidence was found of the use of "compliance guidelines" which are public documents setting out the criteria used to establish control strategies, penalties and sanctions that may go until the closure of the establishment or criminal penalties for wilful and repeat offenders.

## *Approach to inspections*

As the foregoing suggests, enforcement and inspections in Peru are not in general risk-focused (see Principle 3), based on information integration (see Principle 8) or on "responsive regulation" principles (see Principle 4). They rather rely on the more traditional approach of checking all legal requirements without regard to the risks involved, the specific circumstances, or the historic compliance record of those being monitored.

This reflects the general fact that inspections in Peru are not seen as an essential part of regulatory policy and therefore as a key tool to achieve broader policy and regulatory outcomes. Very often compliance and enforcement are just seen as part of the day-to-day work and not as a key element to attain higher policy objectives. This in turn is reflected in a narrow institutional vision that gives precedence to outputs, e.g. number of inspected businesses, number of sanctions, over policy outcomes such as lives saved, extent of competition or reduction in toxic emissions. As a result, the focus of enforcement strategies and inspection activities is not in line with modern approaches (see Box 5.3).

As mentioned before, little evidence was found of the use of "compliance guidelines" which are public documents whose rationale is helping individuals/businesses to progressively comply with the norm, but also allowing for proportional coercive solutions to non-compliance. Compliance levels with regulations are not in general monitored either.

In the same line, with limited cases such as in the SBS, enforcement agencies take little or no effort to communicate with the (future and potential controlled) subjects of regulations about how to meet regulatory requirements, or to share information on how to comply with the rules (see Principle 10).

Although this holds true in general, there is an important distinction on the approach taken by line ministries and independent enforcement agencies that tend to have a different vision of enforcement activities, supported by more transparent governance (see Principle 7).

### Box 5.3. **Risk-based inspections**

A system of risk-based inspections aims to reduce and minimise routine inspections that often produce lower results in terms of accidents prevention, abuses or flagrant breach of regulations. Basically, a risk-based inspection system focuses on individuals/facilities/enterprises producing or dealing with processes and products of greater risk. Such a system is more a process than an organisational arrangement, which requires continuous improvement based on intelligence (in the sense of better exploiting information flows) and information management geared to a better understanding of the levels of performance or results.

The guiding principles of a risk-based inspection are:

- Regulators and the regulatory system as a whole should use broadly risk assessment / analysis to concentrate resources on the areas that need it most.
- Companies and individuals who constantly violate regulations must be identified quickly and face proportionate and meaningful sanctions.

The objective of the system is to assist the enforcement authority to select the most appropriate and cost-effective controls and implement verification tasks by optimizing the efforts and costs for the inspector and for the subjects under control. Some key features and advantages are:

- It focuses on the points of the import, production or distribution chain that pose the greatest risk
- Maximises consumer safeguards and security
- Promotes a preventive rather than a reactive approach to controls by individuals
- Provides more time and resources for inspection visits that have been prioritised
- Optimises the efficiency of controls and the use of inspection resources
- Minimises costs to individuals through improved sampling and concentration in products or processes of high risk by reducing unnecessary costs of inspection and testing
- May significantly reduce inspection costs by focusing efforts on the riskiest cases
- Promotes the development of risk-based regulations that are more transparent than many prescribed regulations, and encourages mutual recognition and equivalence between trading partners

*Source:* OECD (2010), *Risk and Regulatory Policy: Improving the Governance of Risk*, OECD Publishing, Paris, http://dx.doi.org/10.1787/9789264082939-en; OECD (2014), *Regulatory Enforcement and Inspections*, OECD Best Practice Principles for Regulatory Policy, OECD Publishing, Paris, http://dx.doi.org/10.1787/9789264208117-en.

### *Complaint mechanisms and appeals*

The possibility to appeal against regulatory decisions, including those related with enforcement and inspection activities, is a fundamental aspect of the rule of law. An effective and efficient enforcement system must provide readily accessible and transparent means for filing claims and complaints from citizens and businesses under control.

As in many other countries, in Peru the judiciary plays an important role in reviewing administrative acts and decisions through clear and predictable – although very often lengthy – procedures. At the administrative level, Chapter II, Title III of the LGPA defines different types of administrative appeal mechanisms and sets out the appeal process which is applicable to all administrative acts. As such, citizens and businesses have recourse to these mechanisms to appeal enforcement decisions taken by regulatory and enforcement agencies.

Beyond these mechanisms, administrative complaints can also be filed according to the LGPA. These complaints have to be filed before the immediate superior of the authority responsible for the procedure, who must rule within three days. This complaint mechanism is a good starting point. However, in practice, it does not seem to be an easily accessible and transparent means to deter potential unwanted practices from inspectors and public officials in charge of enforcement activities. No evidence was found, for instance, of information being disseminated through flyers of leaflets, clarifying the possibilities, mechanisms and rights to file complaints.

To ensure the credibility and impartiality in the resolution of these complaints it is important that they may be anonymous in order to avoid reprisals from public officials. Also, an independent unit of the enforcement/inspection agency should be responsible for resolving them under certain circumstances, for example in the case of serious professional misconduct, except if the case is referred to the judiciary.

In order to improve this complaint mechanism, enforcement agencies in Peru should also review the range of options, such as setting a dedicated hotline to receive complaints from the public, and designating a public official to assess the complaints received and making recommendations to improve the system overall so as to help reducing corruption and making the process more transparent.

### *Co-ordination*

Given the institutional context in Peru, where multiple inspectorates work across the public administration, Co-ordination among them is essential in order to assure a minimum of effectiveness and efficiency in enforcement and inspection activities. Co-ordination allows avoiding duplications and overlaps, reduces inspections costs for the government and burdens for citizens and businesses, and makes enforcement functions more consistent across the government (see Principle 6).

Sometimes inter-agency agreements are not enough to improve inspections performance. In such cases, governments must analyse the benefits of reforming existing structures – through mergers and consolidation of inspectorates or setting up co-ordination bodies – to achieve the expected results in terms of effectiveness and efficiency.

As pointed out in the section on *Legal and institutional framework*, there are diverse sets of institutions with enforcement functions in Peru, including at regional and local levels. At the same time, in terms of organisation, there is no institutional model or arrangement that has been applied consistently across different inspection bodies, which most of the time were created on an *ad hoc* basis. As a result, co-ordination among inspectorates differs greatly from one sector to another. However, overall co-ordination is practically non-existent.

It is common that line ministries consider inspections not only as sector specific, but as area/unit specific, given that it is not rare that different administrative units in charge of inspections coexist inside a ministry without any co-ordination, exchange of information or sharing of experiences among them. For instance, this is the case in the Ministry of Health of Peru where five inspectorates, including the Sanitary Control and Surveillance Directorate, coexist and do not have co-ordination mechanisms even for those core activities that inspections have in common.[8] These inspectorates have no formal obligation to co-ordinate with other enforcement/inspection bodies, and when they do it, they co-ordinate on an ad hoc basis depending on the specific circumstances under consideration.

At another level, the central government has delegated responsibilities and surveillance functions to subnational governments. These delegated functions are exercised by regional or local governments who have their own inspection bodies. For instance, workplace inspections for medium and large enterprises are responsibility of central government – through SUNAFIL –, leaving to subnational governments the responsibility to inspect smaller business (less than 10 employees).

Finally, as in other areas analysed so far, new enforcement agencies tend to have in general a better record in terms of co-ordination. This is due not only to their capacities (see Section *Capacities for implementing inspections*) and their more modern approach to inspections of these agencies, but most importantly to their institutional arrangement itself. For instance, by law OEFA has direct enforcement functions in environmental matters in five sectors, i.e. mining, energy, fishery, large scale agriculture and industry, and will over time have competence in other sectors as well. However, wherever OEFA has no direct enforcement functions it has the competence to supervise other public entities that hold mandates of environmental enforcement either at the national, regional or local levels. This is part of its leading role in the National System of Environmental Evaluation and Enforcement.

### *Transparency and performance assessments*

Transparency is a cornerstone of an efficient inspection system. Enforcement and inspection activities may be undermined if inspectors do not observe basic administrative procedures and therefore violate procedural rights. This happens when the enforcement authority or the inspector do not clarify the reasons for their actions or inform individuals of their rights. To address these problems, enforcement agencies may issue:

- Formal step-by-step manuals and guidelines to conduct inspections *in situ* (see sub-section *Carrying out the inspection in situ* above)
- Codes of conduct, integrity and ethical behaviour for inspectors and enforcement personnel (OEFA is the only enforcement agency in Peru that was found to have a code of ethics)

- Establish complaint and appeal mechanisms (see the sub-section *Complaint mechanisms and appeals* above)

Finally, it is important that enforcement agencies create permanent monitoring and performance assessments. These monitoring mechanisms can be assimilated to accountability efforts by the authority, and where the subjects of regulation can play an important role.

In Peru, this type of assessments are exceptional and when they are carried out they tend to measure performance in terms of inputs (budgetary, human, and material resources) and outputs (number of inspection visits, complaints, fines, etc.) instead of concentrating on measuring results (outcomes).

## Assessment

***There is no general policy on regulatory compliance and enforcement across government agencies. Moreover inspections are not seen as an essential part of regulatory policy***

There is an important distinction on the approach taken by line ministries and independent agencies with regard to inspections—which is a key component to improve compliance and enforcement. Line ministries consider not only inspections as sector specific, but it is common that inside a Ministry, different administrative units in charge of inspections coexist without any co-ordination, exchange of information or experiences among them.

There is little evidence that regulatory institutions conduct inspections based on risk assessment. In general, inspection activity has to be differentiated between economic and social regulators and ministry agencies. For instance, there are regulators which inspect all regulated entities and others inspect a sample of them.

A notion in which inspections are regarded as a key tool to achieve policy and regulatory outcomes has not been developed across ministries and agencies. Very often compliance and enforcement are just seen as part of the day-to-day work, despite the fact that they represent a key element in regulatory policy to attain higher policy objectives. This in turn can be reflected in a narrow vision that gives precedence to outputs over policy outcomes.

***Step-by-step manuals and guidelines to conduct inspections to achieve policy objectives with transparency and integrity is not a standard practice in Peruvian institutions***

Each institution conducts inspections according to its own regulatory framework, but in several cases inspections processes are not further developed in written guidelines. Additionally, no evidence was found that in these framework and guidelines, a prominent place is given to establish the inspection practices as a tool designed to prevent corruption, regulatory capture and promote transparency.

***The governance arrangements on inspections between central and local government can hamper the effectiveness of inspection to reach policy objectives***

The central government has delegated responsibilities and surveillance functions to subnational governments which can affect the inspection process, the capacity to inspect and the expected policy results from this task.

For instance, workplace inspection's responsibilities have split horizontally between central and subnational governments in some sectors. Workplace inspections for medium and large enterprises are responsibility of central government, leaving to subnational governments the responsibility to inspect smaller business (less than 10 employees).

Considering that institutional capacity and adequate personnel for inspections are weaker at subnational level, and that the quantity of business in the small and micro category is much larger, the risk of having an ineffective inspection policy for the workplace is much larger for subnational governments. The situation can be aggravated when considering that small business are more prone to not complying with regulation given their larger likelihood to be part of the informal sector.

## Key recommendations

- Peru should include the policy of inspections and enforcement of regulations as an integral part of its regulatory policy. The Peruvian government should include and emphasise the importance of compliance and enforcement as part of its broader policy statement to achieve its general objectives of sector regulation.
- This would include addressing the governance of inspection authorities through a cross-cutting policy. This would imply reducing the fragmentation of inspection authorities, improving co-ordination and communication, sharing of information and best practices (including at different levels of government), and reforming the administrative units in charge of inspections within line ministries in order to provide them with more independence from other regulating areas.
- The cross-cutting policy mentioned before should include general guidelines relating to horizontal objectives such as ethical behaviour and corruption prevention, organisation and planning of inspections, and transparency towards the subjects of inspections. It should also include guidelines to implement a risk based approach for inspections, information integration and sharing, and widespread use of third parties to carry out inspections (see Box 5.4 for an international example).
- In order to ensure the effectiveness and efficiency of regulatory enforcement and inspections adequate human, technological and financial resources should also be available to agencies.

### Box 5.4. **Good practice on risk-based inspections: Chicago's Food Inspection Forecasting**

There are over 15 000 food establishments across the City of Chicago that are subject to sanitation inspections by the Department of Public Health (CDPH). Three dozen inspectors are responsible for checking these establishments, which means one inspector is responsible for nearly 470 food establishments. Given the large number of inspections that inspectors have to complete, the time and effort it takes to discover critical violations can mean prolonged exposure to potential disease, illness, and unsanitary conditions at some food establishments.

The CDPH, the Department of Innovation and Technology, a private insurance company and a civic consultancy teamed up to create a computer algorithm to prioritise which establishments were to be inspected first. The analytical model forecasts the likelihood of critical violations for each establishment. It uses results from previous sanitary inspections, weather data, and information from other departments, available on Chicago's open data portal, which provides user-friendly access to more than 600 data sets.

During the pilot of implementation of the algorithm, establishments with critical violations were found, on average, 7.5 days earlier than with the normal operation procedure. As a result of this approach, the risk of patrons becoming ill is potentially reduced.

The risk-based initiative taken by the Department of Public Health goes in line with three International Best Practice Principles for Regulatory Enforcement and Inspections: risk focus and proportionality, responsive regulation and information integration.

*Source*: Adapted from https://chicago.github.io/food-inspections-evaluation/ and Chicago Tech Plan Website: http://techplan.cityofchicago.org/2014-progress/effective-government/ (accessed 14 April 2016); OECD (2014), *Regulatory Enforcement and Inspections*, OECD Best Practice Principles for Regulatory Policy, OECD Publishing, Paris, http://dx.doi.org/10.1787/9789264208117-en.

# Notes

1. Even though Peruvian authorities make a distinction between supervision, audit or investigation, and sanctioning functions, they are all part of the concept of enforcement used in the OECD literature and in this chapter, see Box 5.1.
2. *Source:* Various ministries and agencies of Peru, responses to OECD questionnaire, 2015.
3. The Ministry of Health issued a new by-law *Reglamento* of Internal Organization and Functions of the Ministry of Health, through Supreme Decree No. 007-2016-SA, published on the 12 of February of 2016, which consolidates many of the inspection activities. In these cases, co-ordination and exchange of information should improve.
4. *Source:* Various ministries and agencies of Peru, responses to OECD questionnaire, 2015.
5. In the case of the SBS, the entities are aware of their rights and obligations during the inspection process due to the fact that, three weeks in advanced to the inspection in situ, the SBS asks for all the information that would be required to the entity. However, there could be special urgent cases in which the SBS could ask for information without advance.
6. In the case of the SBS the inspection report is normally shared with the entity supervised, as it is an obligation established in Article 359 of Law No. 26702 Text of General Law of the Financial and Insurance Systems and Organic Law of the Superintendence of Banking and Insurance. Also, it is an obligation that the entity´s board of directors must take knowledge of the inspection report in the next immediate session after the SBS issued the report to the entity.
7. Exceptions include SBS, OEFA; INDECOPI and SUNASS who do have these guidelines.
8. As pointed out before, as a result of a the new by-law *Reglamento* of Internal Organization and Functions of the Ministry of Health, several inspection offices were merged, which should address several of the coordination challenges.

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# *Chapter 6*

# Multi-level regulatory governance in Peru

*Peru is a unitary presidential state, but despite this configuration it has three levels of subnational governments with significant regulatory powers. This setting calls for the establishment of strong governance arrangements that promote co-ordination across levels of governments in order to ensure regulatory coherence and complementarity, and balanced regulatory quality efforts. Despite having mechanism between central and subnational governments to promote the co-ordination of public policies, including fiscal incentives to local governments to encourage them to apply measures of regulatory quality, these have fallen short. As a consequence, there is ample room to seek regulatory coherence across level of government, and promote the adoption or regulatory policy tools by regional and local governments. With the exception of policies on administrative simplification, subnational governments in Peru should apply mechanisms of ex ante assessment of regulation, and of public consultation in the rule making process.*

Where different levels of governments co-exist, regulatory coherence through co-ordination mechanisms between the national and subnational levels of government should be promoted. Cross cutting regulatory issues at all levels of government should be identified to promote coherence between regulatory approaches and avoid duplication or conflict of regulations. Similarly, governments should support the implementation of regulatory policy and programmes at the subnational level to reduce regulatory costs and barriers at the local or regional level which limit competition and impede investment, business growth and job creation. This chapter analyses the current policies applied by the central government of Peru to promote regulatory coherence with subnational regulation, and policies to support the implementation of regulatory policies by local governments.

## Legal powers of local and regional governments to regulate

Peru is a unitary presidential state comprising three branches (legislative, executive and judicial), plus autonomous organs, control institutions and an electoral organisation. The executive branch exercises the government administrative functions of the state and includes all public authorities at subnational levels (departments, provinces and districts). It is chaired by the President of the Republic. In addition, the Presidency of the Council of Ministers co-ordinates national policies with different ministries, civil society and the private sector to create a participative and transparent framework to boost the processes of modernisation, decentralisation, governance, and social and economic inclusion in Peru.

Besides the national government in Peru, there are three subnational layers of government: the Regional Government, the Provincial Municipal Government and the District Municipal Government.[1] Therefore, Peru is the only Latin American economy to have a local government system with two sub-levels: provinces and districts. Peru has 25 departments (regional governments, including Lima and Callao), 196 provinces and 1 853 municipal districts (OECD, 2015).

These governments' levels have exclusive and shared functions which are described in the Peruvian Constitution (CPP), the Organic Law of the Executive Power (LOPE, *Ley Orgánica del Poder Ejecutivo*), the Organic Law of Regional Governments (LOGR, *Ley Orgánica de Gobiernos Regionales*) and the Organic Law of Municipalities (LOM, *Ley Orgánica de Municipalidades*).

Despite the nature of Peru as a unitary country, the subnational levels of government have significant legal powers, and responsibilities. The LOGR and the LOM constitute the basic framework which defines the regulatory powers at subnational levels of government, which can be exclusive or shared powers between other layers of government (see Box 6.1).

Figures 6.1. and 6.2 contain a detailed description of the exclusive and shared legal powers of the four levels of government of Peru. These figures depict a complex picture, which calls for the establishment of strong governance arrangements that promote co-ordination across levels of governments in order to ensure regulatory coherence and complementarity, and balanced regulatory quality efforts.

### Box 6.1. **Legal framework for regulatory powers at subnational levels of government**

**The Organic Law of Regional Governments, Law No. 27867 (LOGR)**

Published on 18 November 2002, the law establishes and regulates the regional governments' structure, organisation, powers, and obligations, and defines regional governments as decentralised or de-concentrated according to the Constitution and the Law of Decentralization Bases. The Law provides Regional Governments with legal personality, with political, economic, and administrative autonomy, in matters falling under its legal attributions.

According to the LOGR, regional governments have two types of legal powers: exclusive and shared attributes. The regional governments have the exclusive faculties to plan the comprehensive development of their own region; implement socio-economical programmes; develop the Regional Development Plan; approve its internal organisation and budget; promote the modernisation of small and medium regional enterprises; promote investments in infrastructure, regional utilities, watersheds, economic corridors and touristic circuits; facilitate the access to international markets for their region's products and services; manage and assign urban and vacant land; promote sustainable use of forest resources and biodiversity; develop regulation on subjects under their powers; among others.

The shared faculties of the regional governments with the national layer include education services; public health; regulating and developing economic and productive activities for agriculture, fisheries, industry, trade, tourism, energy, oil, mining, transport, communications, and environment; dissemination of culture, among others.

**The Organic Law of Municipalities, Law No. 27972 (LOM)**

Published 26 May 2003, the Organic Law of Municipalities establishes the rules on the creation, origin, nature, autonomy, organisation, purpose, types, powers, classification, and economic regime of municipalities. It also establishes the framework that defines the relationship between municipalities and other public and private organisations; as well as the mechanisms for citizen participation and the special regimes for municipalities.

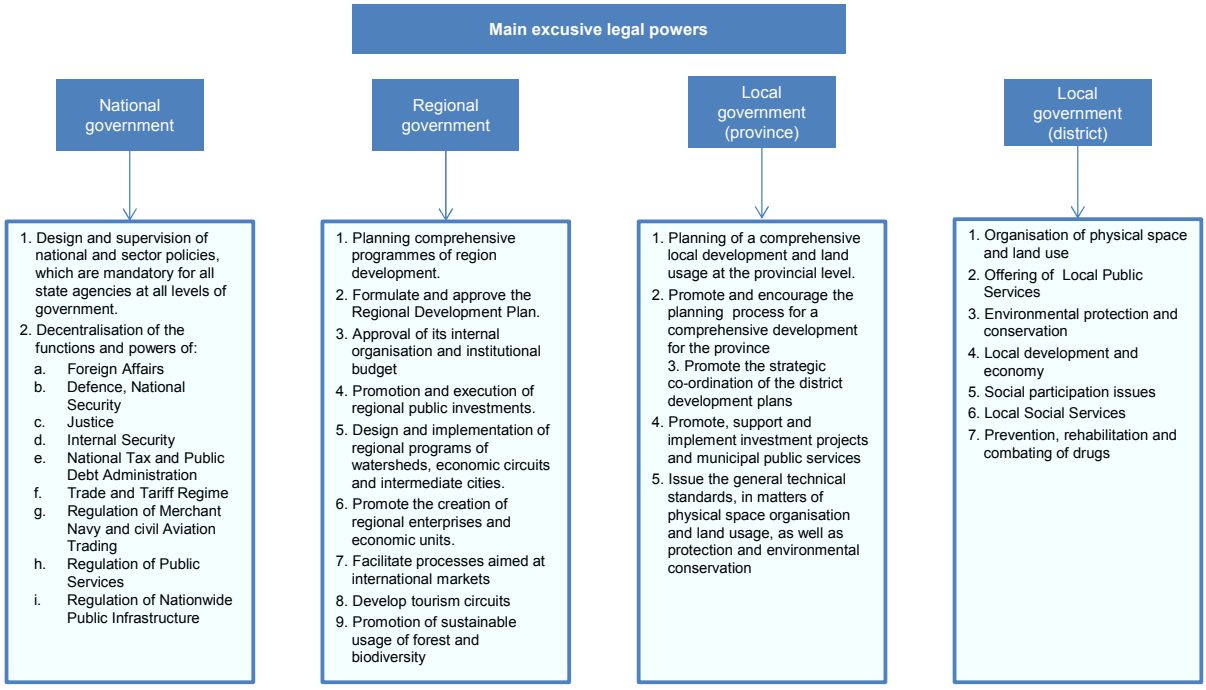
This LOM defines the municipal governments as basic entities in the territorial organisation of the State. These bodies represent the neighbourhood; promote the appropriate provision of local public services and of a comprehensive, sustainable, and harmonic development of its constituency. Municipal governments have legal personality and political, economic and administrative autonomy in matters under their legal attributions.

The LOM classifies municipalities according to i) their jurisdiction, into provincial, district and populated centres; and ii) their special regime, as the Metropolitan Municipality of Lima and the border municipalities.

The Law of Decentralization Basis and the LOM provides provincial and district municipalities with exclusive and shared powers. Province Governments exclusive competences incorporate actions focused on the promotion of regional development; including the land usage and the issuing of the technical guidelines for its organisation and the execution of investment plans. The District Governments have as exclusive competences the organisation of the physical space, the administration of local public services, the environment protection, and the promotion of local development, the social participation and the drug consumption prevention and rehabilitation. The shared competences of District and Local Governments are the use of land and physical space, the local public services, the protection of the environment, the promotion of local development, the social participation, the local services and drug abuse prevention and rehabilitation

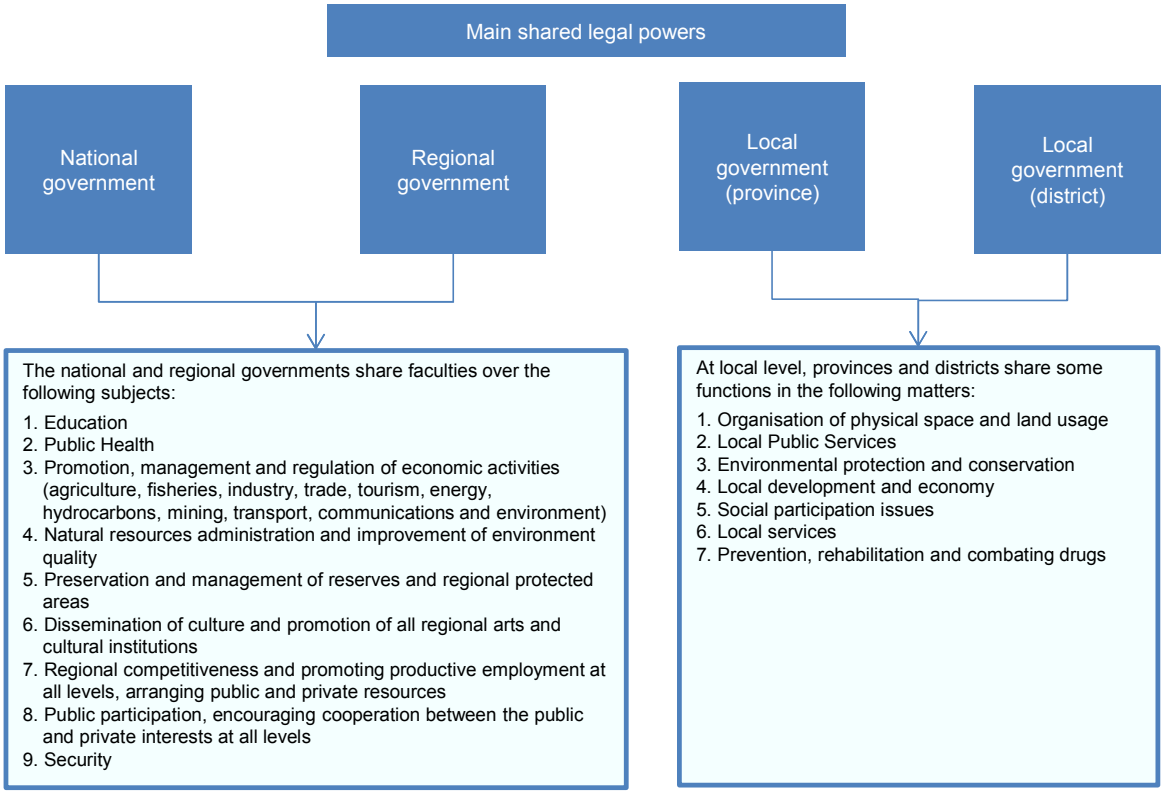
*Source:* Adapted from The Organic Law of Regional Governments of Peru and the Organic Law of Municipalities of Peru.

Figure 6.1. **Exclusive legal powers by level of government in Peru**




*Source*: OECD elaboration based on Organic Law of the Executive Power, the Organic Law of Regional Governments, and the Organic Law of Municipalities.

Figure 6.2. **Shared legal powers between level of government in Peru**




*Source*: OECD elaboration based on Organic Law of the Executive Power, the Organic Law of Regional Governments, and the Organic Law of Municipalities.

At national level the principal regulatory instruments are legislative decrees (with law equivalence), and the sector regulation thorough supreme decrees, ministerial resolutions, directives resolutions, amongst others. At regional level, the principal regulatory instruments are regional ordinances (with law equivalence) and regional decrees and resolutions.[2] Local governments can issue regulation such as Municipal Ordinances, Regional Ordinances and Municipal Agreements. These instruments cannot contravene general laws or be exonerated from national laws.[3]

Furthermore, in the case of shared legal powers, subnational governments have the obligation to issue secondary regulation in order to specify and further develop national laws of equivalent.

## The regulatory interphase between the central and subnational levels of government

Regulatory policy should be embedded in legal powers and obligations at different levels of government. To achieve this objective, co-ordination mechanisms and capacity building efforts are essential to ensure the implementation of such policies. To support this endeavour, the 2012 Recommendation of the OECD council on Regulatory Policy and Governance states that member countries should "where appropriate promote regulatory coherence through co-ordination mechanisms between the supranational, the national and subnational levels of government. Identify cross-cutting regulatory issues at all levels of government, to promote coherence between regulatory approaches and avoid duplication or conflict of regulations" and to "Foster the development of regulatory management capacity and performance at subnational levels of government".

### *Mechanisms for co-ordination*

The legal and institutional framework of Peru establishes a series of mechanism and provisions which should promote co-ordination across level of government to support regulatory coherence across level of governments and foster the development of regulatory management capacities. Nevertheless, the general perception of public officials at the central and subnational level of governments, and of business representatives and academics, is that on one hand significant overlapping regulation and encroaching of legal powers exist, and on the other, there are regulatory voids which create uncertainty to businesses and citizens.[4] Additionally, it was confirmed that subnational governments are yet to adopt many of the regulatory practices that occur at central level, such as public consultation and *ex ante* assessment of regulation (see next section). This calls into question the effectivity of the current arrangements in Peru to seek regulatory quality across levels of government.

One of the main co-ordinating mechanisms between central and subnational governments is the Intra-Governmental Co-ordination Council (CCI, *Consejo de Coordinación Intragubernamental*) which is headed by the President of the PCM, and which is a body in charge of articulating public policies, programs, projects and actions across the levels of government, as well as enhancing the decentralisation process of the government.[5]

In order to prepare the Internal Rules of the CCI (*Reglamento de Funcionamiento del CCI*) the PCM created a temporal Sectorial Commission formed by representatives of national, regional and local governments.[6] The following functions of the Commission related to regulatory policy objectives stand out:

- Strengthen the decentralisation process;

- Enhance the dialogue between the three levels of government;
- Help with the co-ordination and articulation of national, sector, regional and local policies, promoting joint actions;
- Co-ordinate with the PCM the launch of information and communication systems, as well as to monitor the evaluation of the centralised public administration, and
- Propose action which promote and evaluate the decentralisation process.

These functions should provide a relevant framework to seek regulatory coherence, because co-ordination, communication and monitoring of public policies at different levels of government can help to avoid legal duplicities and increase the quality of regulation at all levels of government.

Other co-ordinating mechanism can be found in the Regional Co-ordination Councils (*Consejos de Coordinacion Regional*) and the District and Provincial Co-ordination Councils (*Consejos de Coordinación Distrital y Provincial*). These councils are intended to be co-ordinating bodies between governments and the civil society.

Notwithstanding these efforts, the perception of the co-ordination between levels of governments is not necessarily at an adequate level.[7] It is necessary to enhance the co-ordination actions and promote the achievements of government co-ordination across the stakeholders. In the same way, consultation process in rule making could help to identify which regulatory needs across levels of governments are more important and urgent.

### *Incentives Programme for the Improvement of the Municipalities' Management*

A complementary mechanisms implemented by the central government to reduce bureaucracy at subnational level is the Incentives Programme for the Improvement of the Municipalities' Management (PIM, *Programa de Incentivos de la Mejora de la Gestión Municipal,*). This programme administered by the MEF supports economic growth and development at local level. The PIM is an example of a programme based on incentive schemes for subnational governments. It consists of direct transfers of money to municipalities that reach defined goals regarding joint work with the central government. The objectives of the PIM are:

- To improve the levels of collection and management of municipal taxes, strengthening the stability and efficiency in the perception of them;
- Improve the execution of public investment projects, considering the policy guidelines for improving the quality of spending;
- Reduce chronic child malnutrition in the country;
- Simplifying procedures creating favourable conditions for the business climate and promoting local competitiveness;
- Improve the provision of local public services provided by local governments under Law No. 27972, Organic Law of Municipalities; and
- Prevent disaster risks.

According to the MEF, all municipalities are eligible to participate in the programme as long as they reach the goals. The programme divides municipalities according to several economic and social criteria. As part of the PIM, a municipal ranking is constructed in which all municipalities by category are compared according to the goals achieved. For municipalities, some of the benefits of the ranking are reputational effects for those placed in the top positions, and the capacity to receive additional economic bonuses for the achievement of 100% of the goals according to the rules of the programme. The budget of the PIM is established in the Budget Law of the Public Sector (*Ley de Presupuesto del Sector Público*) on a yearly basis. These types of incentive-based programmes can be very effective in reaching public policy goals, but it should be taken into account that continuity of these programs is based on the administration of the often limited resources.

The PIM seeks to create favourable conditions to the business environment and to promote local competitiveness.[8] The programme is revised and updated annually for budgeted resources, goals and evaluations. For the year 2016, it has 45 goals divided into four types of municipalities: *Municipalities of Major Cities Type A* (15 goals), *Municipalities of Major Cities Type B* (13 goals), *Municipalities of Not Major cities with more than 500 urban houses* (10 goals) and *Municipalities of Not Major cities with less than 500 urban houses* (7 goals). Each goal is evaluated by an agency from the national government (mostly ministries) which oversees the subject matter of the goal. The evaluation is then handed to the MEF, who constructs the overall ranking. In 2016, out of the 45 goals, Table 6.1 displays those related with regulatory policy, and Box 6.2 contains the legal process to allocate the resources.

The PIM represents a significant effort of the central government to promote the adoption of policies and the delivery of results by municipal governments. The potential of this type of tools can be enhanced by means of more intensive benchmarking exercises, coupled with mechanism to exchange lessons learned.

### Box 6.2. **Legal process to allocate the resources of the Incentives Programme for the Improvement of the Municipalities' Management**

The legal process to allocate the resources of the PIM consists of the issue of six legal instruments that approve each step.

1. **Supreme Decree**: approves the goals, procedures for the allocation of resources, and the classification of the municipalities.
2. **Directorate Resolution:** approves the guidelines for the achievement of the goals of the fiscal year.
3. **Ministerial Resolution:** approves the maximum amounts that a municipality may receive in a fiscal year.
4. **Directorate Resolution:** approves the results of the goal evaluation conducted by the involved public agencies.
5. **Directorial Resolution:** approves the Ranking during the fiscal year.
6. **Supreme Decree:** authorises the transfer of resources due to the achievement of goals of the PIM.

*Source*: Ministry of Economy and Finance (2015), "Programa de Incentives a la Mejora de la Gestión Municipal", https://www.mef.gob.pe/contenidos/presu_publ/migl/metas/tipoA_2016_MEF.pdf (accessed 21 April 2016).

Table 6.1. **Goals related with regulatory policy in the Incentives Programme for the Improvement of the Municipalities' Management**

| Evaluator and responsible | Type of Municipality | Goal |
|---|---|---|
| CEPLAN | "Type A" | Design of the Concerted Local Development Plan |
| CGR | A) Municipalities with more than 500 Urban Housings<br>B) Municipalities with less than 500 Urban Housings | Access to the module of requests, registry and actualisation of the executed works in the Public Works Information System – INFOBRAS |
| CGR | "Type A"<br>"Type B" | Implementation of the internal control of the public procurement process |
| SENASA | "Type A" | Elaboration of the municipal registry of transport vehicles and of agricultural traders |
| MEF | "Type A" | Request the information obligations established in the Law No. 28976, Law for the Business Licence, issue the licence in the defined period, and publish in the website the information related with the procedure |
| MEF | "Type A" | Issue the Edification Licence and Urban Housings in the defined period as stated in the regulation, and publish in the website the information related with the procedure |
| MEF | "Type B" | Request the information obligations established in the Law No. 28976, Law for the Business Licence, issue the licence in the defined period, and publish in the website the information related with the procedure. and the Technical Inspection for Edification Safety |

*Source*: General Direction of Public Budget (2015), the Incentives Programme for the Improvement of the Municipalities' Management. (Programa de Incentivos a la Mejora de la Gestión Municipal), https://www.mef.gob.pe/contenidos/presu_publ/migl/metas/tipoA_2016_MEF.pdf (accessed 2 May 2016).

## Regulatory policy and tools at subnational level in Peru

The legal powers of subnational governments in Peru to issue regulation are significant (see Figures 6.3 and 6.4). Considering that Peru has 25 departments (regional governments, including Lima and Callao), 196 provinces, and 1 853 municipal districts (OECD, 2015), an exercise to assess the extent to which subnational governments have adopted and apply regulatory policy and tools must be focused.

For this aim and for the purpose of the present review, the municipalities of Arequipa and Trujillo were selected to assess the extent to which they apply regulatory quality policies. Therefore, the results presented in this section cannot be generalised to all subnational governments in Peru. Nevertheless, the results provide relevant insights and glimpses of the general situation at regional and local level in Peru in terms of efforts to seek quality in regulations.

The main finding is that the challenges on regulatory quality at subnational level are plentiful and significant, as most of the achievements are based only on administrative simplification and the maintenance of the stock of formalities at local level through the TUPAs, and on transparency obligations. As a corollary, no evidence was found of the adoption of *ex ante* assessment and of stakeholder engagement practices when new regulation is to be issued or existing ones are to be modified. This finding is at odds with the practices at central level, where there are legal provisions to carry out *ex ante*

assessment of regulation and of public consultation, which have led to an intermittent application of these practices.

### *Single Text of Administrative Procedures*

The policy of adopting and implementing the TUPA also applies to regional and municipal governments (see Chapter 4). Therefore, regional and local governments are obliged to prepare and publish the TUPAs, as it is the case for agencies of the central government and other state agencies. This tool seeks to standardise the information to be provided by public agencies regarding information obligations for citizens and businesses, formalities and frontline services; as well as to simplify them.

It can be expected that compared to agencies of the central government the challenges for subnational government to prepare and maintain a registry of their stock of formalities are larger. To address this issue, the PCM and the Production Ministry (MP, *Ministerio de la Producción*) published the Guide for the Application of Unique Text of Administrative Procedure (GTUPA, *Guía para la Aplicación de Texto Único de Procedimientos Administrativos*).[9] The GTUPA focuses on provincial and district municipalities in urban areas, and one of its objectives is to provide a standardised framework for the contents of the TUPAs at subnational level, as well as to standardise the formalities with the highest impact on the business environment. This guide indicates the key formalities to be standardised:

- Operation licences up to 100m;[2]
- Urban fit out and edification licence;
- Authorisation of public publicity;
- Installation authorisation of telecomm infrastructure for the provision of public services;
- Authorisation of sidewalks and roads, and
- Authorisation for the use of public spaces with commercial objectives.

The GTUPA provides detailed guidance on what changes are needed to prepare the TUPAs for the above formalities, and what steps are needed to meet the standardised criteria. The GTUPA represents a fine effort to seek regulatory coherence across and between levels of governments. Similar efforts should be expanded to other subnational formalities.

### *Transparency obligations*

In Peru, Transparency web portals are not only standardised on the type information provided, but also in the presentation and organisation; and in all other arrangements, and regardless of the level of government and type of organisation, they must be linked to the central transparency portal.[10]

Basic information provided by these portals includes:

- General details of public officials, laws and regulations;
- Regulation and organisation information (including TUPAs, personnel and staff classifications, procedures manuals, performance indicators, budget, operational plan, amongst others;

- Budget information;
- Investment project information;
- Citizen engagement such as public audits, calls for civil society participation, citizen budget, etc.
- Information of public officials;
- Public procurement;
- Official activities;
- Public infrastructure, and
- Additional information such as official records, requirements of information formats, amongst others.

Transparency portals should promote regulatory coherence by making easy for citizens and businesses to identify their legal obligations, and for government entities to identify duplications, overlapping and/or regulatory voids. In order to achieve the full potential of these benefits, proper oversight must be exercised, and corrective measures applied when non-compliance is identified. As discussed in Chapter 4, the PCM lacks the appropriate resources and legal framework to carry out an effective oversight function on the policies of TUPAs and transparency.

## Case study: Municipality of Arequipa

### *Economic background*

The Municipal Province of Arequipa, which covers the metropolitan area, is the capital of the homonym Department of Arequipa, located in the southern part of Peru. In terms of population, it is the second largest city in Peru with a population of almost one million inhabitants.[11] The city's metropolitan area is composed by 19 municipalities and 29 districts.[12]

In Peru, the municipalities are in charge of the local development of their territory, and they use management and planning tools such as the Concerted Municipal Development Plan.[13] The current plan for the period 2008-2021 includes a diagnosis, main issues, and potential areas of growth and development, for social, economic, territorial, environmental and political dimensions. The plan also states the action lines to further develop the Province of Arequipa.

According to the diagnosis contained in the Concerted Municipal Development Plan, one of the largest opportunity areas of Arequipa's economy is the low level of competitiveness and high levels of unemployment. And one of the city's key infrastructure advantages is the high amount of industrial parks, although in recent years they have been underutilised, which has affected negatively the competitiveness of the city.

Regarding economic contribution, the department of Arequipa is second to Lima, the country's capital, with a 4.90% share of the national GDP in 2014. In the same year the main economic sectors of the city of Arequipa were industry and trade. Arequipa is the second most industrialised city in the country, with a highly diversified industrial sector. The most important manufactured products according to the last Economic Census were common metals, textiles, non-metallic mineral products and food produces.[14]

The trading sector benefits from the connectivity the city has. It is connected to the rest of the country and the outside through a railway system, the Matarani Seaport, the Rodriguez Ballon International Airport, and roadways. The main foreign trade partners of Arequipa City are Brazil, Bolivia and Chile.

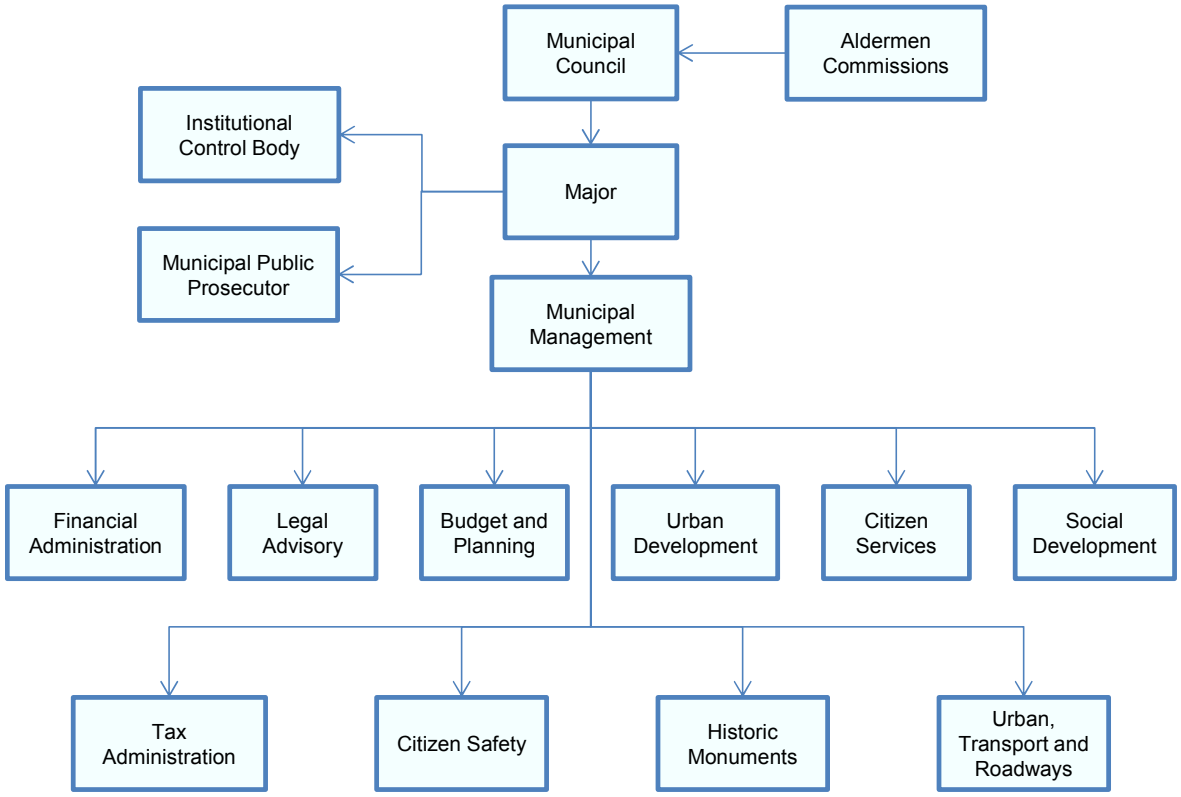
### *Government structure*

The LOM defines the provincial municipalities of Peru, like Arequipa, as the "*Most basic entities of the territorial organisation*". The LOM gives legal personality and political, economic and administrative autonomy to municipalities. The local governments' purpose is to promote social development, capacity building and economic development.

The organic structure of the municipality, as it is stated in the LOM consists on the Municipal Council (*Consejo Municipal*) and the Mayoralty (*Alcaldía*), both elected by vote by the citizens of the municipality. According to the LOM, the Municipal Council has normative and auditing capacities, and the Mayoralty is the executive entity of the local government with the Major as the representative and its highest administrative authority.

The LOM allows the municipal governments to organise the municipal administration according to its needs and budget. In the case of Arequipa, the Bylaw of Organization and Faculties of Arequipa (ROF2015, *Reglamento de Organización y Funciones*,) specifies the faculties of each administrative body and its place within the government structure. Figure 6.3 displays the current structure of Arequipa's municipal government.

Figure 6.3. **Current organisational chart of the Municipal Province of Arequipa**




*Source*: Adapted and translated from the Bylaw of Organisation and Faculties of Arequipa, www.muniarequipa.gob.pe/descargas/transparencia/rof/ROF2015.pdf (access 22 April 2016).

According to the ROF2015, there is an Institutional Control Body (*Órgano de Control Interno*) in charge of promoting transparency in the usage of resources, and a Municipal Public Prosecutor (*Procuraduría Pública Municipal*) who represents and defends the interests and rights of the municipality before judicial courts. Furthermore, the Municipal Management (*Gerencia Municipal*) has the responsibility to plan, organise, guide, co-ordinate and control the activities and projects of the municipal bodies. These entities support the Mayor with the administration of the province and give advice on their matters of competence. It is within the Major legal powers to choose the officials in charge of each management body.

The main municipal bodies include Legal Advisory, Budget and Planning, Urban Development, Social Development, Urban Transport and Roadways, Citizen Services, Citizen Safety, Financial Administration, Tax Administration and Historic Monuments. The first eight municipal bodies mentioned above have legal powers to develop regulation, norms and standards, according to their specific areas, with the purpose to further local development, to regulate the physical space and land use and to protect the environment.

### *Use of regulatory policy instruments and tools*

Regulatory policy in the municipality of Arequipa should be adopted as it can contribute to achieve the goals of the development agenda. Currently, the employment of regulatory policy instruments in Arequipa is limited to specific efforts on administrative simplification and the keep of an inventory of the regulatory stock. In contrast, there is no evidence supporting practices in the application of public consultancy and *ex ante* assessment of regulations.

One of the efforts regarding the administrative simplification practices in the municipality of Arequipa is the launch of *tramifacil*, which is a webpage that provides information on the procedures to obtain licences for business' operations and construction. According to the PCM, the main contributions of *tramifacil* to regulatory quality are the standardised methodologies, the avoidance of duplicities of activities, and the learning from successful experiences.[15] The operation licences which can be obtained in *tramifacil* are for commercial, industrial and service establishments with the exemption of alcoholic beverages and gambling games. Other important element is that citizens can check online the status of their requests and the land feasibility of the business plans through an online land registry. Although this webpage represents a step in the right direction on reduction of burdens for citizens, the benefits for society will increase significantly if the whole process could be done online from start to finish, that is, in a transactional fashion.

A second element of the administrative simplification strategy in the municipality is the publication of TUPAs. These documents contain all the information obligations for citizens and business as part of the formalities in the Municipality of Arequipa. It implies that any formality or any information not described and detailed in the TUPAs cannot be enforced by the authorities.

In Arequipa public consultation is not a standard practice. However, the municipality has organised discussion groups for specific regulatory pieces, as in the case of meetings with transport sector stakeholders when discussing regulatory instruments that have an incidence on these groups. These meetings were carried out to avoid possible reactions from the transport unions, according to public officials from Arequipa. Consultancy process helps avoid such problems, but it has more benefits. The main one is that

regulatory decisions are based on evidence collected from the consultation itself, which helps legitimise the government intervention. Thus, consultation practices should be adopted for all cases when new regulations are to be issued, or existing ones are to be revised.

Subnational governments in Peru do not have a guide to help them prepare and issue ordinances and other regulation of their responsibility. In the case of Arequipa, the municipality employs the manual of legislative technique of the MINJUS. This is not the ideal scenario, because this manual is oriented towards agencies of the central government. Furthermore, Public officials in Arequipa reported that they find difficult to get help and advice from agencies of the central government when preparing their own regulations, even in cases in which they have to further develop national laws, as no official contact point exist.

The local government of Arequipa does not have an impact assessment or any other instrument to evaluate *ex ante* possible effects of regulations. While impact analysis is a sophisticated tool which requires important human resources, a possible alternative is to employ a checklist which helps policy makers to be aware of the possible effects of regulations (see Box 6.3).

### Box 6.3. **The Regulatory Criteria Checklist of British Columbia, Canada**

In British Columbia, Canada, the Regulatory Criteria Checklist (RCC) replaced RIA in 2001. Ministers and heads of regulatory authorities must make sure that any proposed legislation, regulation and new policy are evaluated according to the criteria set out in the checklist. A signed copy of the RCC or exemption form must be included with any legislation submitted for Executive Council review and any Order in Council that is being recommended by the responsible minister to the Executive Council to enact a regulation. Copies of the signed RCC and exemption forms must be provided to Straightforward BC. In addition, the responsible minister or head of a regulatory authority must make the RCC available to the public, at no charge, on request.

The RCC itself is simple and includes several questions in eleven different categories: i) Reverse onus: Need is justified, ii) cost-benefit analysis, iii) competitive analysis, iv) streamlined design, v) replacement principle, vi) results-based design, vii) transparent development, viii) time and cost of compliance, ix) plain language, x) simple communications, and xi) sunset review/expiry principle.

Each category has a yes/no checkbox next to it. If the answers to the questions in any category are "no", then an explanation must be attached. At the end of the form, there is a box that asks how many regulatory requirements will be added and how many will be eliminated, as well as what the net change will be. When the reform policy was first introduced in 2001, two regulatory requirements had to be eliminated for every one introduced. Since 2004, when the original goal to reduce regulation by one-third was met, a target of no net increase has been in place and extended to 2015. The RCC encouraged a change in culture from one where regulation was seen as the answer to any problem and the private sector was viewed with some suspicion to one where questions are asked, alternatives are considered, and the contribution that businesses make to the economy is better understood.

*Source:* García Villarreal, J.P. (2010), "Successful Practices and Policies to Promote Regulatory Reform and Entrepreneurship at the Sub-national Level", *OECD Working Papers on Public Governance*, No. 18, OECD Publishing, Paris, http://dx.doi.org/10.1787/5kmh2r7qpstj-en.

## Case study: Municipality of Trujillo

### *Economic background*

The Municipal Province of *Trujillo*, which covers the metropolitan area, is the capital of the Department of *La Libertad*, located in northern Peru in the Pacific Ocean coast. The province of *Trujillo* has a population of more than 800 000 people, which represents 50.2% of the population of *La Libertad*, according to the last National Census of 2007.[16] This allocates *Trujillo* as the third city in terms of population in Peru, behind Lima and Arequipa and the largest in the northern region.

*Trujillo* is connected to the rest of the country by two main roadways: the Panamericana and Penetracion a la Sierra Liberteña roadways; one national airport located 13 km from Trujillo named *Capitan FAP Carlos Martinez Pinillos*; and the railway system. It also has connectivity to the rest of country and the world through the Salaverry port, located 8 km from the Panamericana roadway, which is one of the most active in the country.

In economic terms, the department of *La Libertad* occupied the fourth place with 4.5% of the GDP of Peru in 2014. The Province of *Trujillo* concentrates the majority of the economic activity of the department, with 44.6% of the economic production of *La Libertad*. This makes Trujillo the centre of development of the region.[17] *Trujillo*'s main economic activities are manufacture, trade and construction. It produces mainly food products and footwear. In fact, in 2008 *Trujillo* had 50%[18] of the establishments producing footwear of the country and it was the leader export city, distributing footwear products to Bolivia, Argentina, Chile and other cities inside Peru.[19]

The construction sector of *Trujillo* was the second most dynamic in the country during 2008, after Lima and it is three times the size of Arequipa. In the same line, the GDP from trade was the fourth largest in the country.[20]

According to the 2012-2021 *Municipal Provincial Concerted Development Plan of Trujillo*, the key economic issues that Trujillo is facing are poverty, low quality of basic services (water supply) and crime. Unemployment, which reached 4.0% in 2008, is not seen as an issue in the above mentioned report, but this could be due to a large proportion of informality in the labour sector, mostly within medium and small enterprises.

### *Government structure*

As in the case of Arequipa, the structure of the municipalities of Peru is stated in the LOM. The organic structure of the municipality is composed by the Municipal Council (*Consejo Municipal*) and the Mayoralty (*Alcaldía*). The Municipal Council is formed by the Major and a number of aldermen determined by the National Election Jury. The Municipal Council has regulatory and auditing faculties. Accordingly, the Mayoralty is the executive body of the local government and the Mayor is the legal representative and its highest administrative authority. The Major and the Aldermen are both elected by vote.

The municipal administration is determined by each municipality according to its needs and budget, as provided by the LOM. In the specific case of Trujillo, the Bylaw of Organization and Faculties of the Municipal Province of Trujillo (ROF2012, *Reglamento de Organización y Funciones*), was enacted with the purpose to "establish the attributes and faculties of the different organic units, to direct the administration to reaching goals

and to precise the responsibilities (…), with the purpose to prioritise and optimise the use of public resources".

According to the ROF2012, the municipality has an Institutional Control Body (*Órgano de Control Institucional*) in charge of exercising control over the organic bodies of the municipality and a Municipal Public Prosecutor (*Procuraduría Pública Municipal*). The former is designated in a public competition and depends on the General Comptroller of the Republic (*Contraloría General de la República*); the last is in charge of the judiciary defence of rights and interests of the municipality which is designated by the Mayor.

The municipal administration is mainly composed by the Municipal Administration (*Gerencia Municipal*), advice bodies, support bodies and executive bodies. The head of each body is designated by the Mayor and they can be removed by the Municipal Council. The Municipal Administration is the highest technical-administrative body and it is in charge of guiding and driving the administrative, financial and economic management of the municipality, as well as the provision of the municipal services. The municipal administration complements the executive and administrative faculties of the Mayoralty.

The advice bodies are composed by the Legal Advice and Planning and Budget offices. The support bodies are the General Secretary, Institutional Image, Administration and Finance, Personnel and Systems. Finally, the governing bodies are Urban Development, Economic Development, Public Works, Education, Culture, Youth and Sports, Social Development, Citizen Safety and Civil Defence and Transport, Traffic and Road Safety.

The organisation of the municipality's administration explained above, as stated in the ROF2012, does not match that of the current organisation chart showed in Figure 6.4. There are discrepancies not only in the naming of the administrative bodies, but also on the existence of some of them. For instance, Urban Development is not included in the chart. Furthermore, the website of the Municipality of Trujillo shows another discrepancy with these two documents. In it, additional administrative bodies can be found, for instance the Civil Registry Office (*Oficina de Registro Civil*). This shows a lack of update and harmonisation between the current administrative organisation and the ROF2012.

### *Use of regulatory policy instruments and tools*

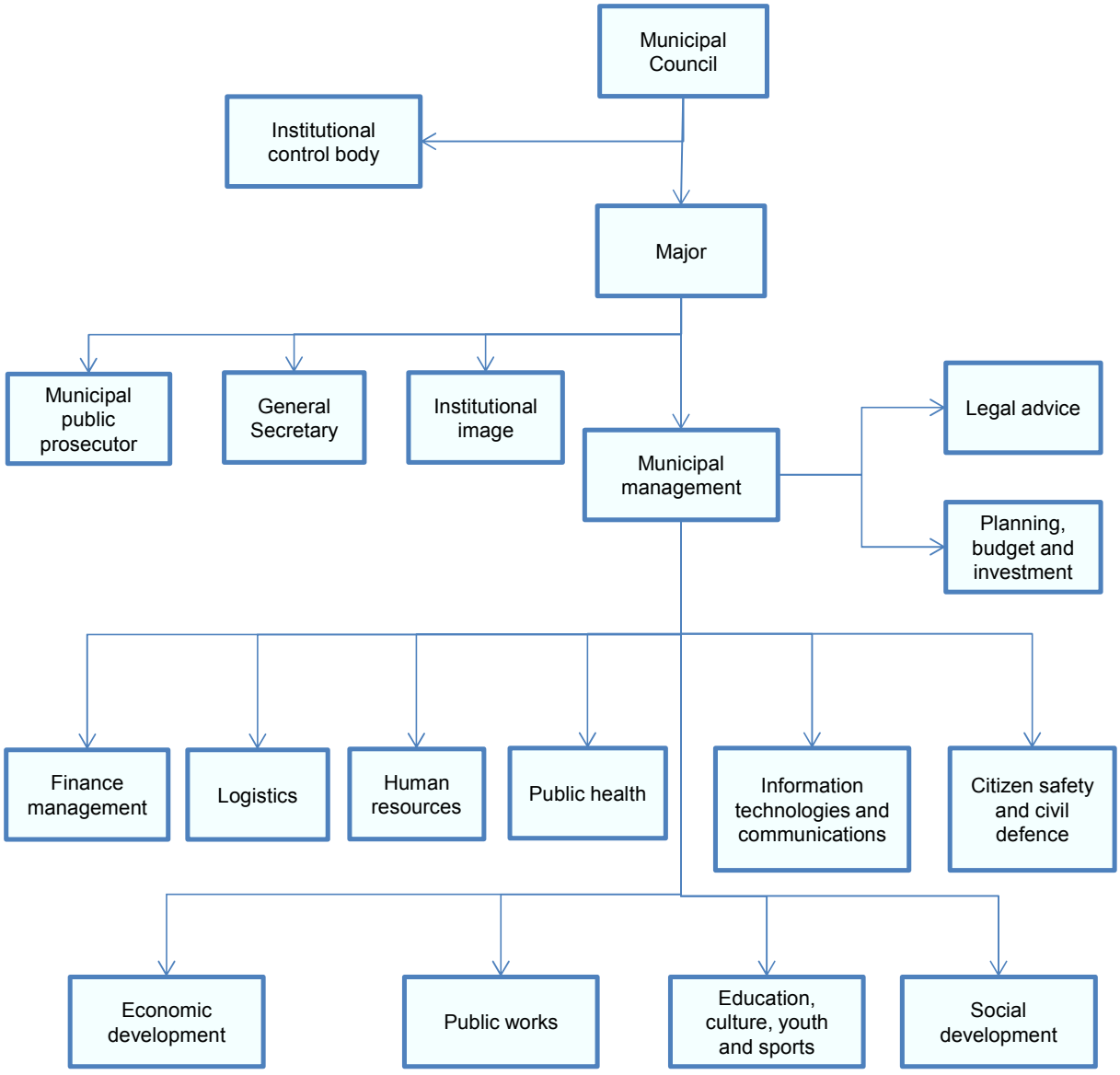
As in the case of Arequipa, regulatory policy instruments in Trujillo should be implemented and employed fully. In this municipality, the efforts to ensure the quality of regulations have been focused almost exclusively on administrative simplification. For instance, the Portal www.munitrujillo.gob.pe gathers the main advances in administrative simplification in Trujillo.

The municipality of Trujillo is involved in the scheme *tramifacil*. It is a web portal which displays information obligation and municipality, whose main objective is to avoid duplicities in information and reduce response times for licences and permits. For instance, the Portal www.munitrujillo.gob.pe has a virtual office in which citizens can submit information for some basic formalities and municipal services such as complaints and make book reserves. This can be seen as a foundation for digitalisation of formalities, but there is not a plan to identify, simplify and digitalise the mot burdensome formalities.

In this portal, citizens can check the status of some requests and licence applications. In order to access the portal, the citizen has to fill a request form. The portal has information on the procedures for formalities regarding Operation Licences, Urban Development, Transport, Construction Licences, Civil Registries, Civil Defence, Health and Internal Control. On these topics, the users can check the status of their applications.

In contrast to the efforts on administrative simplification, the municipality does not conduct a consultation process of proposed regulations, but according to public officials, for some topics on urban development and economic development, it organises work sessions or consults informally with the citizen to review specific issues. This practice however is yet to be adopted systematically.

Figure 6.4. **Current organisation chart of the Municipal Province of Trujillo**




*Source*: Created by the OECD according to the Organisation Chart of Trujillo Valid for 2015, www.munitrujillo.gob.pe/Archivosvirtual/Transparencia/Adjuntos/6069_portalTransparencia.pdf (accessed 29 of April, 2016).

Public officials of the municipality of Trujillo also employ the manual of legislative technique of the MINJUS to guide them in the process of drafting local regulation, despite the fact that it is not oriented to subnational governments.

Finally, similar to Arequipa, in Trujillo there are no provision to carry out an *ex ante* assessment of new regulations or of proposals of regulations to be modified. Available tools that can be adopted by Trujillo for *ex ante* assessment include regulatory checklists (see Box 6.3).

## Assessment

***Peru has not developed a regulatory policy for subnational governments, and as a result there is limited co-ordination between central and subnational government to achieve a coherent national regulatory framework, and to promote good regulatory practices and tools***

Because Peru is a unitary country, at the central level it has the capability to issue laws and other legal instruments, which are mandatory for all levels of government. However, subnational governments still have significant regulatory powers. They can issue their own regulatory instruments, called "ordenanzas", and must implement several national laws by issuing further secondary regulation. Therefore co-ordination across levels of government is needed for an effective regulatory policy. The central has created mechanism to seek co-ordination with subnational governments on matter of public policy, but not specialised on regulatory policy. Additionally, it offers fiscal incentives and money transfers to subnational governments to encourage the application of administrative simplification policies. The tasks performed by the Commission for the Elimination of Bureaucratic Barriers in reviewing formalities at all levels of government also contributes to improve the quality of regulation at regional and local level in Peru (see Chapter 4).

Despite these efforts, there is not a co-ordinated regulatory policy across levels of government in Peru, which can lead to the existence of duplications and loopholes in the regulatory framework. From the information collected from the cases of the municipalities of Arequipa and Trujillo, it was found that there is not an office or contact point to which subnational government can resort to when it comes to settle doubts or request guidance on how to issue regulation to implement central laws or other legal instruments. At the central level, line ministries and other regulatory agencies also complain that subnational governments exceed their regulatory powers by issuing regulation that either overlaps with the national framework, or establish contradictory terms.

***With the exception of the policy on administrative simplification, the practices that are applied at the central level, even at their current stage of intermittent application are not promoted by the central government to subnational governments. This includes ex ante analysis of regulation, promotion of legal quality, and pre-publication. As a result they have not been adopted at the regional and local level***

The fiscal incentives and money transfers to subnational governments to encourage the application of administrative simplification policies, and the tasks performed by the Commission for the Elimination of Bureaucratic Barriers in reviewing formalities at

subnational level, contribute to reduce the burdens for citizens and businesses from formalities at regional and local level. As in the case of the central government, subnational governments are obliged to follow the preparation and publication of the TUPAs) and apply all the strategies and programmes on administrative simplification issued by the PCM. However, the challenge for the PCM to effectively supervise these policies at subnational level remains.

However, for the case of the other regulatory tools applied at central level, which include the preparation of a cost-benefit analysis for draft regulation, the obligation to publish the draft regulation, and the obligation to follow the Guide on Legislative Technique are not actively promoted by the central government to be adopted by subnational ones. From the information collected from the cases of the municipalities of Arequipa and Trujillo, it was found that they do not follow these practices, or they did not know about the available guidelines to improve the quality of their regulation.

## Key recommendations

- When issuing the statement on regulatory policy, Peru should include formal measures to establish co-ordination with subnational governments to promote a coherent national regulatory framework, and promote actively the adoption of regulatory tools, such as *ex ante* analysis of draft regulation, consultation and stakeholder engagement, amongst others. Formal venues for the co-ordination, such as conferences or help desks, should be considered. Guidelines and compendiums of good practices should also be enhanced and promoted across subnational governments (see Box 6.4).

### Box 6.4. **National support to develop regulatory policies at the subnational level in Mexico**

In Mexico, the Federal Law on Administrative Procedure grants on COFEMER the mandate to promote regulatory quality in states and municipalities. Accordingly, COFEMER helps states develop their own laws on regulatory improvement. Twenty out of the thirty one federal states and the Federal District have a law on better regulation, mandating state authorities and, sometimes, municipalities, to pursue regulatory improvement policies. In addition, eight states have laws on economic development containing a section on regulatory improvement.

The number of state and municipal public servants trained by COFEMER increased from 147 in 2008, to 370 in 2009, 484 in 2010, 647 in 2011, and 6 540 in 2012. This is in addition to the National Conference on Regulatory Improvement that COFEMER organises twice a year. One of the main multi-level co-ordination mechanisms used in Mexico consist of covenants between COFEMER, states and municipalities. These covenants establish that COFEMER will provide training, advice, and implementation assistance concerning regulatory policies and tools. For example, COFEMER has led the implementation of the System for quick business start up (SARE), which is a simplification programme for start-up procedures. Up until October 2011, 189 SARE had been implemented, leading to the establishment of 264 489 businesses and 701 157 jobs, with an investment of MXN 42 441 million. According to COFEMER, the turnaround time for the municipal start-up licence went down from 25.2 to 2.4 days in the municipalities that established SARE between March 2010 and November 2011.

Just recently, COFEMER started promoting a regulatory governance cycle approach in states and municipalities. Accordingly, it has helped states and municipalities to develop and apply RIA, build centralised registries, and carry out regulatory reviews.

*Source*: OECD (2014), *Regulatory Policy in Mexico: Towards a Whole-of-Government Perspective to Regulatory Improvement*, OECD Publishing, Paris, http://dx.doi.org/10.1787/9789264203389-en.

- As part of this policy, a more active strategy on fiscal incentives and money transfers could be established, which could cover regional governments as well, not only municipalities, to incentivise the adoption of all tools. As a complementary measure, a policy of evaluation and assessment in the progress of the adoption of these tools by subnational governments could also be pursued, as a way to create league tables and further promote the implementation of the tools.
- The policy should also include the delivery of capacity building training to regional and local officials to aid the implementation of regulatory policy at subnational level.

# Notes

1. Provincial Municipal Governments, may or may not have District Municipal Governments.
2. Organic Law of Regional Governments of Peru.
3. Organic Law of Municipalities of Peru.
4. Information obtained by the OECD during the interviews of the fact finding missions.
5. Article 19, LOPE.
6. Ministerial Resolution No. 082-2013-PCM.
7. Interviews with industry representatives in the municipalities of Trujillo and Arequipa conducted on November of 2015.
8. Art. 2. Supreme Decree No. 400-2015-EF.
9. Guide to the implementation of the Single Text of Administrative Procedures (TUPAs). Design for Provincial and District Municipalities in Urban Areas (*Guía para la aplicación de Texto Único de Procedimientos Administrativos (TUPA). Diseño para Municipalidades Provinciales y Distritales en Zonas Urbanas*) (2009). USAID, Perú ProDescentralización.
10. Law No. 27806: Transparency and Access of Public Information Law (Ley de Transparencia y Acceso a la Información Pública).
11. National Census of Population and Housing 2007, National Institute of Statistics and Information of Peru.
12. According to the Municipality of Arequipa's Website: www.muniarequipa.gob.pe/.
13. Municipality of Arequipa's Concerted Municipal Development Plan 2008-2021.
14. IV Economic Census 2008.
15. Consulted on www.oecd.org/gov/regulatory-policy/non-member-countries.htm.
16. National Census of Population and Housing 2007, National Institute of Statistics and Information of Peru.
17. Municipal Provincial Concerted Development Plan of Trujillo 2012-2021.
18. Regional System of Information for Decision Making (*Sistema de Información Regional para la Toma de Decisiones*). National Institute of Statistics and Information of Peru.
19. Municipal Provincial Concerted Development Plan of Trujillo, 2012-2021.
20. IV Economic Census 2008.

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*Chapter 7*

# The governance of regulators in Peru

*This chapter addresses the governance arrangements in force in Peru for regulatory agencies that have a degree of independency from the central government.* The OECD Best Practice Principles for Regulatory Policy: The Governance of Regulators *is employed as benchmark to assess elements such as role clarity, decision making and governing body structure for independent regulators, accountability and transparency, amongst others. It is found that economic regulators in Peru have a large degree of independence to exert budget and decision making, and that their practices on transparency and accountability are more advanced compared to obligations in the central government. Peru should consider strengthening the governance of economic regulators by reviewing their legal links with central government in order to enhance their decision making, upgrading current policies to make regulators more accountable to the central government, to Congress and to the general public, and introducing a system of ex ante impact assessment.*

## Introduction

Good regulatory outcomes depend on more than well designed rules and regulations. Regulatory agencies are important actors in regulatory systems that are at the delivery end of the policy cycle. The OECD's 2012 Recommendation recognises the role of regulatory agencies in providing greater confidence that regulatory decisions are made on an objective, impartial and consistent basis, without conflict of interest, bias or improper influence. This chapter describes the practices of Peruvian regulators and assesses their use of the *OECD Best Practice Principles for Regulatory Policy: The Governance of Regulators* (OECD, 2014). It focuses only on regulators included in Law 27332: Framework Law of the Regulatory Organisms of the Private Investment in Public Services. These agencies are SUNASS (National Superintendence of Sanitation Services), OSIPTEL (Supervisory Agency for Private Investment in Telecommunications), OSINERGMIN (Supervisory Agency for Investment in Energy and Mining) and OSITRAN (Supervisory Agency for Investment in Public Transport Infrastructure)

This chapter highlights a brief description of each regulator's tasks, followed by the description of each governance principle. Practices of the Peruvian regulators are then assessed in the context of these principles. Finally, a general assessment of the principles as a whole is presented in order to identify areas of improvement and alternatives to policy issues.

## Regulators in Peru: institutions and functions

In Peru, as in many Latin-American countries, the eighties were characterised by poor economic performance which came along with high public deficits and debt, high inflation, low inflows of private investment and trade, among others economic issues. In the beginning of the nineties, the strategy of the government to counteract these issues was the implementation of several economic structural reforms focused on macroeconomic stabilisation, markets liberalisation, economic growth and private investment. These reforms represented a political challenge, as they involved significant changes at constitution level and in primary laws.

In this context, the Peruvian Government created new regulatory agencies in order to promote competitiveness and competition, as well as to enhance productivity in key economic sectors. These new institutions were established with the aim to supervise the performance and the development of markets, which would be opened for private investment in transport, telecommunications, energy, and water sanitation.

Four regulatory agencies were created as Decentralized Public Organisms (DPO), a type of government bodies defined in Law No. 27332. They were SUNASS, OSIPTEL OSINERGMIN and OSITRAN. According to this law, the DPO are decentralised bodies of the executive branch with nationwide competences and assigned to the Presidency of the Council of Ministers. Amongst other implications, this formal linkage entails that any organisational, institutional or functional change in this economic regulators requires approval by the Council of Ministers.[1] Subsequently, with the Law No. 29158, Organic Law of the Executive Branch (LOPE), the regulatory agencies were reclassified as Specialized Public Organism (SPO). According to the LOPE, the SPO have independence to perform their duties under their Act creation. In what follows there is a brief description or main tasks of each regulator.

### *National Superintendence of Sanitation Services*

The National Superintendence of Sanitation Services (SUNASS, *Superintendencia Nacional de Servicios de Saneamiento*)[2] is the Peruvian agency in charge of regulating, supervising and monitoring the provision of drinking water and sewage service in urban areas. SUNASS oversees and enforce legal and contractual obligations of sanitation utilities. Since August 2016, SUNASS regulates the groundwater monitoring and management service in some urban areas for non-agricultural groundwater users SUNASS also oversees the quality and nationwide coverage of these utilities, and is also in charge of settling customer complaints.

It also regulates tariffs for the provision of drinking water and sewage. In particular, it evaluates and sets tariff structure, tariff levels, and its readjustments. SUNASS also establishes targets for utilities'coverage and quality of sanitation, among other activities. Furthermore, it is responsible of supervising that contracts signed by firms in the water and sewage market are carried out and their obligations are met.

SUNASS was created by the Law Decree No. 25965 (19 December 1992), its General Rules were approved by the Supreme Decree No. 017-2001-PCM (of 21 February 2001) and the Regulation of Organization and Functions was approved by Directive Council Resolution 032-2006-SUNASS-CD.

### *Supervisory Agency for Private Investment in Telecommunications*

The Supervisory Agency for Private Investment in Telecommunications (OSIPTEL, *Organismo Supervisor de Inversión Privada en Telecomunicaciones*),[3] is responsible for regulating and supervising telecommunications in the country. The tasks of OSIPTEL on telecommunications in Peru include rule enforcement and dispute resolution between actors, participants and consumers in the sector. Additionally, OSIPTEL is the competition agency on telecommunications' markets.

The agency has the authority to fix tariffs for certain telecommunication services, as well as to define and impose sanctions and corrective measures to firms or individuals participating in the sector due to non-compliance of legal or technical obligations set under concession contracts and regulation.

The Legislative Decree No. 702 (8 November 1991) constituted the OSIPTEL and its General Rules were approved by Supreme Decree No. 008-2001-PCM of 2 February. The current Regulation of Organization and Functions was approved by Supreme Decree No. 104-2010-PCM on 3 December 2010.

### *Supervisory Agency for Investment in Energy and Mining*

The Supervisory Agency for Investment in Energy and Mining (OSINERGMIN, *Organismo Supervisor de la Inversión en Energía y Minería*)[4] is a public institution in charge of regulating and supervising the national compliance of legal and technical obligations related to electricity, hydrocarbon and mining sectors. In 2010 by Law No. 29325, Law on the National System of Evaluation and Environmental Control, and Supreme Decree No. 001-2010-MINAM, the functions of supervision, control and enforcement on environmental matters were transferred to the OEFA. The last modification of the established functions for OSINERGMIN is due to the transfer of powers to control occupational health and safety to the Ministry of Labour, determined by Law No. 29783, in 2011.

OSINERGMIN was created by Law No. 26734 on 31 December 1996. But it started to operate on 15 October 1997, supervising and regulating only the electricity and hydrocarbon companies. In 2007, OSINERGMIN also assumed the responsibility of monitoring the mining sector. Its General Rules were approved by Supreme Decree No. 054-2001-PCM of 9 May 2001 and its Regulation of Organization and Functions was approved by Directive Council Resolution No. 459-2005-OS/CD of 20 December 2005, recently replaced by the Supreme Decree No. 010-2016-PCM of 12 February 2016.

### *Supervisory Agency for Investment in Public Transport Infrastructure*

The Supervisory Agency for Investment in Public Transport Infrastructure (OSITRAN, *Organismo Supervisor de la Inversión en Infraestructura de Transporte de Uso Público,*)[5] is the entity responsible to supervise and regulate the investment in public transport infrastructure (air services, seaport services, railways, highways).

OSITRAN guarantees access, quality and continuity of transport infrastructure. Additionally, it oversees the fulfilment of public transport infrastructure concession contracts while safeguarding the interests of the State, investors and users. In particular, OSITRAN is in charge of the economic regulation related to transport infrastructure, including, among others, the establishment of tariffs, charges and access to public transport infrastructure.

OSITRAN was created by Law No. 26917 of 23 January 1998. Its General Rules were approved by Supreme Decree No. 044-2006-PCM of 27 July 2006; and its current Regulation of Organization and Functions was approved by Supreme Decree No. 012-2015-PCM of 28 February 2015.

## General regulatory framework of regulators

Each regulator is constituted through specific laws but its main objectives, principles and normative functions are complemented on general rules approved by supreme decrees. Main organisational features and powers, are stated in Law No. 27332: Framework Law on Regulatory Agencies for Private Investment in Public Utilities (LMOR*, Ley Marco de los Organismos Reguladores de la Inversión Privada en los Servicios Públicos,*), which was enacted in 2000.

This law defines regulatory agencies as entities with administrative, functional, technical, economic and financial autonomy. Therefore, OSITRAN, OSIPTEL, OSINERGMIN and SUNASS are self-governing to define their technical guidelines, objectives and strategies. Notwithstanding these agencies can define their expenditure policy, it has to be done in concordance with the general governmental policy defined in the Organic Law of the Executive Branch as they are ascribed to the Presidency of the Council of Ministries.[6]

According to the LMOR, regulators have supervising, regulatory and normative functions, as well as the duty to inspect, fine and to solve controversies between stakeholders and complaints from users or costumers. Additionally, regulators have specific supervising, inspecting and fining tasks described in other laws.

The governance body of each economic agency consists of a board of five directors – six in the case of OSINERGMIN.

According to the Supreme Decree No. 014-2008-PCM, all members of the Board are selected by public contest:

- The selection committee is integrated by: one member proposed by the PCM, one member proposed by INDECOPI, one member proposed by the MEF and one member proposed by the sectorial ministry related to regulator activities;
- The candidates must prove experience and formal education in the sector;
- The President of the Council of Ministers submitted to the President of the Republic the final list of selected candidates; and
- The President of the Republic appoints the member of the Board by Supreme Resolution, which will be endorsed by the President of the Council of Ministers, the Minister of Economy and Finance and the sectorial ministry related to the regulator activities.

According to Supreme Decree No. 042-2005-PCM (*Reglamento* of LMOR), each Board member is appointed for a period of five years and every year one member of the Board is renewed according to above procedure.

The practice of board designation, as indicated by the LMOR, is usually correlated with lower probabilities of regulatory capture, because the process becomes more transparent (OECD, 2014). Also, considering that according to the LMOR candidates must prove experience and formal education in the sector, quality on the regulatory decisions should also be enhanced.

The LMOR also establishes that SUNASS, OSIPTEL OSINERGMIN and OSITRAN can collect *regulatory contributions* from regulated firms. By law, each agency's contribution is approved by the Council of Ministers through a Supreme Decree subscribed by the President of the Council of Ministers and the Minister of Economy and Finance.[7] It cannot exceed 1% of the total annual income of regulated firms after taxes[8] of each firm. Apart from this *regulatory contribution*, regulators can collect additional income from the following sources:

- Payments from administrative procedures enlisted in their Single Text of Administrative Processes (*Texto Único de Procedimientos Administrativos*, TUPA)
- Donations, contributions or transfers made by natural or legal, national or international persons
- Interests or late fees derived from the *regulatory contribution*
- Financial interests generated by their own resources
- Sources from fines[9]

Another important aspect established in the LMOR is the Council of Users (*Consejo de Usuarios*), which is a participation mechanism for stakeholders interested in the regulatory activity of the sector.

## OECD Principles of Governance of Economic Regulators and their application in Peru

The OECD has built standard international principles for good regulatory practices. These principles were built to improve the regulator's governance and the effectiveness in the overall regulatory system, including the three powers of the State, the regulated entities, the public and the regulators.

The importance of these principles relies on how they shape policy making outcomes due to an improvement over well-designed rules and regulations. The OECD's *Recommendation of the Council on Regulatory Policy and Governance* (OECD, 2012), state that countries must: "Develop a consistent policy covering the role and functions of regulatory agencies in order to provide greater confidence that regulatory decisions are made on an objective, impartial and consistent basis, without conflict of interest, bias or improper influence." The *OECD Best Practice Principles for Regulatory Policy: The Governance of Regulators* is an effort to assist countries in developing such policy through specific recommendations on the design of regulators.

In order to accomplish the objective to expand positive outcomes from regulatory actions, co-operative efforts amongst governments, regulators, regulated entities and the civil community are required. Therefore, regulators' governance arrangements must induce and foster co-operative efforts to build the legitimacy of any enforcement action.

The *OECD Best Practice Principles for Regulatory Policy: The Governance of Regulators* provides guidance to governments when establishing or reforming regulatory agencies and regimes. They offer regulators advice on how to evaluate and improve the governance arrangements to become more effective. Moreover, the principles also provide a framework to assess and review the current structure of regulatory agencies and address practical questions on how to deal with different country contexts. The principles are the following:

1. Role clarity
2. Preventing under influence and maintaining trust
3. Decision making and governing body structure for independent regulators
4. Accountability and transparency
5. Engagement
6. Funding
7. Performance evaluation

The following descriptions of each role are an extract of the *OECD Best Practice Principles for Regulatory Policy: The Governance of Regulators* (2014).

### *Role clarity*

The role clarity principle suggests that the role of any regulator must be accurately defined in terms of its objectives, functions, agreements or relationships with other public or private entities. This should be clear for the regulator and those under the scope of the regulation as regulated bodies, citizens and stakeholders.

Role clarity is required in order to organise and conduct actions under the regulatory framework and to achieve the effectiveness of the regulation (see Box 7.1 for an international example). Unless clear objectives are specified, the regulator may not have sufficient context or guidance to establish priorities, processes and boundaries for its work. In this context, going beneath or beyond faculties is not efficient. Clear objectives on the other hand are needed to promote trust and transparent relationships between regulators and regulated entities.

In order to fulfil the role clarity principle, a regulator needs to take into account the following:

- Regulators should be afforded with the appropriate powers to achieve their objectives and to discharge their responsibilities and activities.
- When the objectives established in the legislation are set strategically broad, it is important to institutionalise other principles for the regulator to ensure capability to manage discretion.
- Actions of the regulator should remain within the scope defined by the legislation. Thus, the regulator has to be monitored in open, transparent and accountable processes. It also has to be penalised when it goes beyond its legitimately intended powers.
- Functions of the regulators must be complementary to each other, avoiding potential conflict amongst them. Thus, performance of any function should never limit or compromise the ability to fulfil other function.
- Obligations promoting regulatory compliance should be focused and the rationale and evidence behind regulators' decisions should be clearly set out in the regulator's business plan. It is important to consider that due to limited staff and financial resources, there will always be competition when prioritising functions.
- To reduce overlap and regulatory burdens, regulators should be explicitly empowered and required to co-operate with other bodies. The instruments for co-ordination between entities, such as formal agreements or contracts should be published in the interest of transparency.

Role clarity principle provides a framework by which regulators can be accountable to Congress or stakeholders. This is because performance indicators should be defined and computed as the objectives are accurately assigned.

### Box 7.1. **Telecommunications in Mexico**

The 2013 telecommunications reform in Mexico created the Federal Institute of Telecommunications (IFT), as the agency in charge of sector regulation and antitrust. The Law of Telecommunications and Broadcasting states the faculties of both IFETEL and the Ministry of Communications and Transport (former regulator of the market).

IFT is in charge of regulating, promoting and supervising the use, exploitation of the radio electrical spectrum, orbital resources, public telecom networks and the concession of broadcasting and telecommunications. It also regulates the access to the active and passive infrastructure and other essential inputs. IFT is in charge of the technical guidelines regarding infrastructure and equipment that connect to the telecom network. Finally, it is the authority on antitrust issues for the telecommunication market.

The tasks of the Ministry of Telecommunications and Transport are more oriented towards the promotion of the market. This includes activities such as: planning policies to assure universal coverage, collaborate on international agreements on telecom, acquire infrastructure, and so forth.

The separation of regulatory and promotion activities, and the further autonomy of the regulatory agency in the Mexican telecom market has enhanced the role clarity principle in both authorities.

*Source*: Federal Law of Telecommunications and Broadcasting (Ley Federal de Telecomunicaciones y Radiodifusión, www.dof.gob.mx/nota_detalle.php?codigo=5352323&fecha=14/07/2014 (accessed 4 April 2016).

*Practices of regulators in Peru regarding role clarity*

Peruvian economic regulators OSPITEL, OSINERGMIN, OSITRAN and SUNASS have clear and detailed functions that allow them to operate with technical, administrative and financial independency from the central government. The main functions of the regulators are clearly stated in different legal instruments. The nature of regulators for instance is stated in the LMOR as decentralised public organisations (Art. 2) with interior legal capacities and with administrative, financial, technical and economic autonomy.

However, they have links with the Presidency of Council of Ministries that could reduce independency. Since they are assigned to the Presidency of the Council of Ministers, any reorganisation or institutional change, as well as changes in their regulation and functions, requires a supreme decree to give legal validity to the changes, similar to any other agency of the central government of Peru, and hence it also requires approval by the Ministry of Councils.[10] The LMOR also grants and details the supervision, normative and inspective functions, which provide the operation framework for regulators.

General and specific objectives of economic regulators are stated in their general rules: for OSITRAN is the Supreme Decree No. 044-2006-PCM, for OSINERGMIN the Supreme Decree No. 054-2001-PCM, for OSIPTEL the Supreme Decree No. 008-2001-PCM; and for SUNASS the Supreme Decree No. 017-2001-PCM.

### *Preventing undue influence and maintaining trust*

Interaction between regulators and regulated entities should work in both directions; from regulators to regulated entities and the other way around. The first case is evident but in fact, regulators should learn from regulated entities about the industry environment and actors' behaviour so as to establish better suited regulation.

The regulatory framework design is not an easy task and guidance by industry actors would be valuable. On the other hand, there are incentives from regulated entities to influence regulators to lighten regulation. Thus, preventing undue influence and maintaining trust at the same time is a challenging goal to achieve (see Box 7.2 for an international example).

Box 7.2. **Federal Communications Commission (FCC): United States**

The Telecomm regulator of the United States publishes a three year strategic plan. The latest version covers from 2015 to 2018. Such strategic plan sets four strategic goals to generate credibility as it enhances the tasks evaluation accurately. The report outlines specific objectives for each of the following goals. In this context, as it can be seen in the Strategic Goal 4, the FCC has established a public commitment to improve accountability and transparency practices, which contributes to prevent undue influence and maintain trust.

**Strategic goal 1. Promoting economic growth and national leadership:** The first goal is to promote the expansion of competitive telecommunications networks, which are a vital component of technological innovation, economic growth and helps to ensure that the country provides opportunities for economic and educational development to their citizens.

**Strategic goal 2. Protecting public interest goals:** The rights of network users and the responsibilities of network providers form a bond that includes consumer protection, competition, universal service, public safety and national security.

Box 7.2. **Federal Communications Commission (FCC): United States** (*cont.*)

**Strategic goal 3. Making networks work for everyone:** In addition to increase the development of competitive networks, the FCC must also ensure that all Americans can take advantage of the services they provide without artificial impediments.

**Strategic goal 4. Promoting operational excellence:** The objective pretends to make the FCC an excellence model of efficiency inside the government by effectively managing its resources, maintaining a transparency commitment and be responsive for processes that encourage public involvement and the service focused on public interest.

*Source:* Federal Communications Commission: Strategic Plan 2015-2018, https://www.fcc.gov/about/strategic-plans-budget (accessed 4 April 2016).

An option in the design of a regulator with the objective to avoid undue influence is the independence from the executive branch. It can provide confidence and trust regarding the objectivity, impartiality and consistency of the regulator's. Of course, independence is not always the unique path to enforce a regulatory framework with positive outcomes. According to the *OECD 2012 Recommendations of the Council on Regulatory Governance*, independent regulatory agencies should be considered in situations where:

- Independence is needed to maintain public confidence in the objectivity and impartiality of decisions.
- Government and non-government entities are regulated under the same framework and competitive neutrality is therefore required.
- Decisions of the regulator could have a significant impact on particular interests and there is a need to protect its impartiality.

It is advised that the regulator should be legally independent and have a structurally separate body if any of the following factors are valuable:

- Credible commitments in the long run—an independent regulator sends a message about the government commitment on the objective and transparent administration.
- Greater distance from political influences is more likely to result in consistent and predictable regulatory decision-making.
- Addressing potential conflicts of interest.
- Development of regulatory expertise.

So as to consider if regulatory decisions would be better suited under the direction of a ministry, it should be taken into account if some of following situations are present:

- The regulatory function must be closely integrated to the Ministry´s activities, which retains the focus of specific knowledge and expertise within government.
- The environment being regulated is subject to rapid change with policy still being developed.

- The regulatory function is incidental to non-regulatory Ministry activities, and creating a separate entity to perform functions or assigning it to an existing independent regulator is not justifiable.

If an independent regulator reports directly to the legislature, clear procedures and mechanisms for reporting and consultation should be clearly set. When a Minister has been granted with powers to issue specific directions as a regulator, the limits of the regulatory powers should be clearly set out.

Another important institutional arrangement that protects the regulators' independence is the provision of terms of appointments of independent board members. Appointing terms and appropriate grounds for board-member removals with distance from any electoral cycle is likely to promote independence from the political process.

### *Practices of regulators in Peru regarding preventing undue influence and maintaining trust*

Economic regulators in Peru seem to enjoy good reputation as professional and effective agencies across public institutions, enterprise chambers and academy. Nevertheless, these practices can be enhanced further to prevent regulatory capture and maintain trust from all stakeholders.

Law No. 27806 Law of Transparency and Access to Public Information establishes that all high ranking officials of the public administration of Peru, including economic regulators, must make publicly available information on officials meetings. Additionally, according to the current rules for the regulators, which include the supreme decrees OSITRAN: No. 044-2006-PCM, OSIPTEL: 008-2001-PCM, OSINERGMIN: No. 054-2001-PCM, in order to conduct meetings with external actors, the user must inform to the General Management of the regulator the reason, day and hour of the meeting. These meetings have to comply with the guidelines and criteria established by the General Management. The only regulator that does not have rules of this nature that go beyond the obligations set in the Law of Transparency and Access to Public Information is SUNASS. All economic regulators publish on internet information of their meetings, but there is variation across regulators in the available information This is a relevant practice, but a standard practice across regulators should be implemented.

Peruvian regulators have close interaction with stakeholders and they undertake relevant actions that can help prevent undue influence and maintain trust of stakeholders. For instance, each of the *Supreme Decrees* indicated above state the obligation for regulators to conduct a public consultation for any general rule to be issued. The draft regulation has to be published in the Official Gazette "*El Peruano"* or another media outlet that guarantees diffusion. It must include an explanatory statement and the deadline to receive comments from stakeholders, which must not be shorter than 15 calendar days from the publication date.

## *Decision making and government body structure for independent regulators*

An adequate governing body structure is important to improve the effectiveness and objectivity of the independent regulators decisions, as well as to safeguard its independence. The *OECD Best Practice Principles for Regulatory Policy: The Governance of Regulators* (2014) indicates three main governance structures:

- *Governance Board Model:* the board is the main responsible for the oversight, strategic guidance and operational policy of the regulator. The regulatory decision-making functions are delegated to the chief executive officer and to its staff.
- *Commission Model:* in comparison with the *Governance Board Model*, the board itself makes the most substantive regulatory decisions.
- *Single Member Regulator:* an individual is appointed as regulator and it makes the most substantive regulatory decisions and delegates other decisions to its staff.

When deciding between a multi-member and a single member-decision-making model, the following factors should be taken into account:

- The potential consequences of regulatory decisions (commercial, safety, social, environmental, etc.), including the degree of impact and the probability of occurrence. For instance, a multi-member-decision-making model is less likely to be *captured* than an individual, but a group will bring differing perspectives to decisions.
- Collective decision-making provides better balancing of judgement factors and minimises the risks of varying judgements.
- Strategic guidance and oversight of delegated regulatory decisions required to achieve regulatory objectives.
- Where regulatory decisions require a high degree of judgement a multi-member decision making body provides more "corporate memory" over time.
- A board will be less susceptible to political or industry influence than a single decision maker.

### *Practices of regulators in Peru regarding decision making and government body structure*

Peruvian economic regulators have adopted a commission model, in which there are five directors (with the exemption of OSINERGMIN that consists of six). This model can help preventing regulatory capture from public, government and regulated entities, as the probability of capturing the board is lower than the probability of capturing a single administrator. The main strength in this respect is the appointment by public competitive selection of candidates, who must demonstrate relevant experience and formal training.

One salient feature in the decision-making body structure is that there is an open call for candidates who must comply with minimum eligibility requirements, and who have to participate on a public contest. After the contest, selected candidates are directly proposed by central government officials. The mechanism therefore promotes the appointment of experts in the regulatory field of the position.

A relevant mechanism to avoid the executive branch having control of the board of directors is established in Article 6.4 of the LMOR: "Members of the Management Board of the Economic Regulators can only be removed in case they have incurred in a serious misconduct that has to be proved and founded. Previously, an investigation has to be initiated and they will be given fifteen days in order to submit their defence, in accordance with their respective regulations. The removal is made effective through a Supreme Resolution, endorsed by the President of the Council of Ministers, the Minister

of Economy and Finance and the sector Minister of the regulated industry. In case of removal, the President of the Council of Ministers will inform within ten working days to the Congress of the Republic's Permanent Commission the reasons behind their decision." Through this mechanism, the regulator is also protected from potential influences from the parent Ministry.

### *Accountability and transparency*

Accountability and transparency are important elements that could create confidence between stakeholders. As far as organisations are more conscious about sharing information, their operation creates confidence. In order to promote confidence on regulatory policies, regulators need to be accountable and transparent to three groups of stakeholders:

- Ministers and the legislature
- Regulated entities
- The public

The regulator exists to achieve objectives deemed by government to be in the public interest and operates using the powers conferred by the legislature. Then, it is accountable to the legislature and should report regularly and publicly the achievement of its objectives and the discharge of its functions. It should also demonstrate that it is efficiently and effectively discharging its responsibilities with integrity, honesty and objectivity (see Box 7.3 for an international example).

Box 7.3. **Environmental Protection Agency (EPA): United States**

The EPA reports as a relevant part of its tasks the enforcement of federal clean water and safe drinking water laws; the support for municipal wastewater treatment plants; and pollution prevention efforts to protect watersheds and sources of drinking water. Annually, the EPA sends a report to the Congress with a performance evaluation and a financial analysis. This report is also published in their website with free access to the general public.

The financial section includes consolidated financial statements with extensive notes to clarify such reports. An audit to the financial statements is conducted by an external agency which is included in the report. The notes of the financial statements include the following information:

- Leases
- Payroll and benefits payable
- Loans receivable
- General property, plant and equipment
- State credits
- Preauthorised mixed funding agreements
- Stewardship land
- Funds from dedicated collections

*Source*: U.S Environmental Protection Agency: Fiscal Year 2015 Agency Financial Report, https://www.epa.gov/planandbudget/results (accessed 4 April 2016).

The regulator has a responsibility to exercise its powers in a way that increases confidence in the market, it has to assure the rule of law and create trust in the state. At the same time, the regulator is also accountable of the exercise of its powers and the degree of achievement of its policy goals.

Complete disclosure to the public and regulated entities of the regulator's objectives and policies should contribute to create confidence and understanding about what it is expected from the regulators and how their compliance will be monitored, judged and enforced. As long as a regulator makes transparent its goals, it can be scrutinised by rigorous methods and *ex post* evaluations can be conducted. A mechanism to clarify Ministers' expectations over the performance and behaviour of regulated entities is the subject of a *Statement of Expectations* and a *Corporate Plan*. Each *Statement of Expectations* should outline the most relevant governments' policies, current objectives and details of the operation strategy. The document should also involve relevant stakeholders because defining expectations will improve the extent of which they can buy-in the regulatory activity and outcomes.

The regulator should outline in the *Corporate Plan* and the, *Statement of Intent*, how it proposes to meet the expectations of the government. This document should include key performance indicators agreed with the relevant Minister. Where competing priorities exist within a regulator's functions for a given objective, the *Corporate Plan* should outline a set of prioritising principles. Both, the *Statement of Expectations* and the *Corporate Plan* (including key outcomes, outputs, quality and timeliness performance indicators agreed between the Minister and the regulator), should be published on the regulator's website.

It is relevant that the executive and the legislators monitor and review periodically how the regulation system is working and how it is aligned with the intended plan. In order to facilitate this, the regulator should develop a comprehensive and meaningful set of performance indicators. It is also recommended to have independent external reviews of significant regulatory decisions. External reviews, when they come from independent entities subject to transparency and accountability measures themselves, can act as an accountability mechanism and can improve the quality of the regulator's decision-making and internal review processes. The mechanisms for the external independent reviews should be timely, transparent and robust. It is advisable that the regulator should outline on its website the process by which regulated entities may seek an independent external review.

As for the regulated entities, they should have the right of appeal of decisions that have a significant impact on them, preferable through a judicial process. Such right of appeal shall be allowable, on grounds that the regulator has exceeded the powers attributed to it.

### *Practices of regulators in Peru regarding accountability and transparency*

Economic regulators in Peru must meet the transparency responsibilities as all public institutions in the Peruvian central government, according to the Law No. 27806 Law of Transparency and Access to Public Information. In general, transparency obligations focus on general and budget information of agencies, public procurement, official activities and public finance management, which are some of the basic obligations in many OECD countries for public institutions.

In general, economic regulators in Peru display more and more profound information than the rest of the central administration. Examples include: more detailed information on meetings with stakeholders, comments from the public to draft regulatory proposals, and performance indicators related to financial and budgetary matters.

It is important to consider that transparency obligations should be aligned with independency of functions. Thus, as long as any public institution is more independent, more transparency practices are needed to insure confidence amongst stakeholders and avoid regulatory capture.

Accountability is also a concept which has to be aligned with independency. Peruvian economic regulators report relevant information to different institutions of the central government, according to their regulatory framework. They also address information requests and enquiries from Congress on regular basis, although there is no current obligation to provide performance reports to Congress on a systematic way.

For instance, regulators report the implementation of recommendations to the General Audit Office of the Republic (*Contraloría General de la República*); budget execution to the Ministry of Economy and Finance; strategic and operation plans and performance indicators to the Presidency of Council of Ministries; amongst others. These practices are relevant to evaluate specific tasks of regulatory agencies, but it is important to be accountable to external public powers which could evaluate the regulator´s performance as a whole, from administration targets to the achievement of strategic objectives.

The four regulators publish their budgetary information in their website, including information on revenues and expenditures. For instance, the planned budget expenditure of SUNASS is presented in terms of activities: administrative management, legal advisory, development of regulatory instruments, regulation and tariff fixation, amongst others. This practice goes in the right direction when pursuing accountability and transparency. Nonetheless, there is opportunity for improvement in terms of the consistency of the information. For instance, the executed budget could be presented with the exact same categories as the planned budget, in order to make easy comparisons.[11]

### *Engagement*

A primary objective of good regulator governance is to enhance public and stakeholder confidence in the regulators' decisions and actions. Effective engagement with regulated parties and other stakeholders helps to achieve this. It is important, though, to inform about the policy-making process and the decisions of the regulator. This can improve the quality and efficiency of the rules and regulations that are implemented and enhance the credibility of the regulatory framework (see Box 7.4 below for an international example).

Effective engagement is vital to achieve positive regulatory outcomes which are supported by community and regulated entities; there are risks however concerning engagement that need to be managed because it is crucial not to favour particular interests. The simple appearance that engagement has favoured some interests can compromise the regulator's ability to achieve broader outcomes. An alternative to prevent this situation is an open and transparent consultation. It allows any regulated party or member of the public to contribute and comment on proposals rather than just allow participation of representative groups. It is very important to ensure that all actors as regulated entities have the same channel to express opinions and there is no distinction between them.

### Box 7.4. **Office of Gas and Electricity Markets: United Kingdom**

The Office of Gas and Electricity Markets of the UK (OFGEM) is an independent regulator of the United Kingdom overseeing the gas and electricity markets funded by licences provided to the private industry. OFGEM has formal mechanisms of engagements; both with the industry and other British regulators.

The engagement platform with the private stakeholders is particularly important since the nature of its funding calls for a strong relationship with the regulated entities. The regulator conducts industry meetings, stakeholder events and working groups to receive inputs from the markets to assure quality on its public policies. All of these forums may be found on OFGEM's website.

An example of a periodical working group is the Demand Side Working Group. Its purpose is to "identify and address any practical or commercial obstacles to demand side participation in wholesale gas or electricity trading arrangements". The group has meetings every twelve weeks. For each meeting, OFGEM publishes its minute of the meeting and the presentations given.

The minute includes the following information:

- External attendees
- OFGEM attendees
- Introduction
- Agenda items (the items cover particular subjects of the meeting)
- Other business
- Date of the next meeting

*Source*: https://www.ofgem.gov.uk/publications-and-updates/sustainable-development-advisory-group-minutes-june-2015 (accessed 1 of April 2016).

Some regulators have formal advisory bodies established in legislation or explicit power in the legislation enabling the Minister or the regulator to create formal advisory bodies. These advisory bodies may be helpful to provide insights from industry actors and the community on strategies to influence behaviour or warning on developments that could create a change in the compliance approach of the regulator.

A consultation policy is also a strategy in which the regulator makes the key stakeholders be aware of the regulator's practices and its expectations. Apart from the mechanisms used, engagement with key stakeholders should be institutionally structured to produce concrete and practical opportunities for dialogue based on achieving active participation and if possible, exchange of empirical data rather than to achieve consensus.

### *Practices of regulators in Peru regarding engagement*

Communication between regulated entities and regulators is done through public consultations, direct meetings to discuss specific points of interest and user's councils.

Public consultation is a mechanism which contributes to co-ordinate interaction with stakeholders, limit the risk of regulatory capture, and promote transparency. As long as consultation is carried out with the objective to improve draft regulation, and the regulator communicates the way comments are addressed and taken into account,

engagement with stakeholders can be an effective regulatory tool which promotes participation. In Peru, all economic regulators prepare a *matrix of comments* that assembles stakeholders' comments on regulatory proposals. This matrix also includes the regulation under consultation; the proposed modifications; the name of the stakeholders providing comments; the specific comments, opinions or point of view of the stakeholders; and the evaluation of the regulator regarding these comments which includes whether and how the comment will be considered.

According to the LMOR (Art. 9-A), economic regulators will have one or more *Councils of Users* with the objective to constitute a mechanism for stakeholder participation on each sector—council members will be elected for two years. These councils can be local, regional or national depending on the characteristics of the markets. Regulators publish a call for potential candidates to the council, as well as a provisional list of candidates and a final list of elected members. Member councils come from consumer associations, universities, professional colleges, non-profit organisations and business organisations not related with the regulated entities.

The *Councils of Users* is a practice that enhances stakeholder engagement practices of Peruvian regulators. In the case of OSITRAN there are seven councils of users: three national councils for airports, ports and road network; and four regional councils for Arequipa, Piura, Cusco and San Martin. In the internet portal of OSITRAN information on these councils is available.

Regarding public consultation, this takes place regularly across regulators, but further steps can be taken to establish this practice is in a more systematised way. For instance, the website of OSITRAN has a platform where public consultation of draft regulations passes through four steps: draft proposal, public audience, comments and final decision. However, since 2012 there have been only seven public consultations: one in 2012, five in 2015 and one in 2016. This has included the publication of the matrix of comments, which includes responses from OSITRAN and if applicable, modifications due to stakeholder's comments.

### *Funding*

Regulators can be funded mainly by two means: cost-recovery fees or government budget funding. In order to enhance public confidence and efficiency in the regulator's decisions, it is essential to have clarity and transparency of the financial funding sources and expenses. Clarity about the regulator's sources and levels of funding are necessary to protect its independence and objectivity (see Box 7.5 for an international example). This can be archived by making a disclosure on its annual report about who pays for the regulator's operations, how much and why, as well as what proportion of its revenue comes from each of these sources. A good practice is that regulator submits to the Minister for approval a *Corporate Plan* with the proposed expenditure.

When cost-recovery fees contribute to the funding of the regulator, it should be taken into account that:

- The level of the (cost recovery) fees and the scope of activities associated with fees. It is advisable that the legislature or the Minister sets the fees according to the policy objectives of the government and any cost recovery guidelines.

- Regulator should be aware that fees increase the overall cost of regulations and because of this, it has to ensure that the new scheme does not impose unnecessary or burdensome costs on regulated entities and create significant compliance costs that cannot be justified through a cost benefit analysis.
- The scheme and process to determine recovery-fees should be transparent, clear, understandable and accessible to all stakeholders.

Sometimes is not efficient to impose charges to users or there are other justifications not to charge them. In that case, budget funding can be an appropriate mean to fund regulators. Under this scheme, multi-year funding arrangements can contribute to maintain the independence of the regulator by protecting it from budget cuts motivated by political reaction to unpopular decisions.

Under budget funding and cost-recovery fees, financial transparency can reduce: i) the risks to the regulator's political and administrative dependence from government; and ii) the over-sensitivity to lobbying against the public interest. It is recommended that all contracts with third parties should be disclosed and the regulator should be able to demonstrate that all activities funded contribute directly to meeting its policy objectives.

Box 7.5. **Office of Rail and Road, United Kingdom**

The rail regulator of the United Kingdom is mainly funded by industry fees. During 2013-14 the ORR had an income of GBP 13.3 billion from which GBP 9.0 came from passengers' fares, GBP 3.8 billion from the Government and GBP 0.5 billion from other sources.

In this way, the Office of Rail Regulation can work with more autonomy from the central government as its budget is not decided by the executive branch or approved by the Parliament. Nonetheless, to ensure transparency of the budget management, the ORR sends to the Parliament and publishes on its website an annual report with detailed financial indicators.

*Source*: http://orr.gov.uk/about-orr/open-rail/how-the-rail-industry-works/railway-funding-in-britain (accessed 4 April 2016).

### *Practices of regulators in Peru regarding funding*

According to regulator officials, budget resources for all regulators, with the exemption of SUNASS, seem to be sufficient to cover the current regulatory responsibilities. The funding scheme is defined in the LMOR (Art. 10). The financial resources available for each regulator consist of up to 1% of the total annual amount of sales from regulated entities after consumer and municipal taxes. This amount is set through supreme decree, approved by the Council of Ministries and endorsed by the President of the Council of Ministries and the Ministry of Economy and Finance.

The funding scheme of economic regulators in Peru seems to be consistent with OECD practices. However, a drawback of this arrangement is that profitability of regulated entities across sectors can be low, and this may limit the resources available. Such is the case of SUNASS, whose budget comes from public utilities (frequently with financial distress), and which according to SUNASS officials it is not enough to conduct the agency´s duties and functions properly.

### *Performance evaluation*

Performance evaluation is important to regulators because it allows them to be aware of the impacts of their actions and decisions. Of course, this helps to conduct policy improvements which rely on internal systems, processes and effectiveness of actions. Performance evaluation can be conducted in different ways, *ex ante*, when actions are taking place and *ex post* (see Box 7.6 for an international example). The selected strategy to conduct performance evaluations, however, has to guarantee that results are spread and that the regulator is open to improve its performance applying short and long run remedies. A good performance evaluation should take into account:

- A comprehensive group of meaningful indicators in line with the objectives and goals expected to achieve. These should incorporate quantifiable regulator's activities, as well as the costs it imposes.
- Independent external evaluations from bodies with high level of transparency and accountability should focus on the achievement of the strategic goals of the regulator. Internal evaluations should focus on the processes and procedures of its overall operations.

Box 7.6. **Key Performance Indicators of regulators in Australia and how Australian Communications and Media Authority (ACMA) meet them**

The Australian Government has set a benchmark to homologate self-performance evaluation throughout each public agency. By means of the following six Key Performance Indicators (KPI) each agency, including regulators, carry out and publish their performance evaluation:

- KPI 1: Regulators do not unnecessarily impede the efficient operation of regulated entities
- KPI 2: Communication with regulated entities is clear, targeted and effective
- KPI 3: Actions undertaken by regulators are proportionate to the risk being managed
- KPI 4: Compliance and monitoring approaches are streamlined and co-ordinated
- KPI 5: Regulators are open and transparent in their dealings with regulated entities
- KPI 6: Regulators actively contribute to the continuous improvement of regulatory frameworks

Taking this KPI into account, every public agency of the Australian Government conducts its own evaluation with particular methodologies. In its annual report published in August 2015, ACMA explained the four-stage process it took to conduct its performance evaluation:

- **Stage 1:** Assess available evidence to support each performance measure and then map this to the relevant Regulator Performance Framework (RPF) of KPIs. The nature of the available evidence against each performance measure will vary according to sector, environmental factors, consumer behaviour, technological innovation, and risk profile.
- **Stage 2:** Setting of targets and benchmarking. For the first cycle of the RPF, targets are drawn from statutory targets across the ACMA's functions. Additional stretch-targets and baseline measures for benchmarking to support continuous improvement of the ACMA's performance will be identified on completion of the ACMA's first full RPF cycle.

Box 7.6. **Key Performance Indicators of regulators in Australia and how Australian Communications and Media Authority (ACMA) meet them** (*cont.*)

- **Stage 3:** Individual analysis of each RPF of KPI. This will comprise an assessment against: the relevant ACMA performance measures evidence against the RPF of KPIs stakeholder satisfaction with the ACMA's performance. The ACMA will seek direct input from stakeholders as to their assessment of the ACMA's performance against its self-assessment questions. This will be via a consultation process that the ACMA anticipates conducting in December and June of each RPF cycle.
- **Stage 4:** Reporting. The ACMA will then use the analysis developed at stages 2 and 3 to report on its performance against the RPF of KPIs, both individually and as a whole. The scope of the ACMA's remit will influence the choice of measure, as different sectors the ACMA regulates have varying degrees of interaction with the ACMA and different risk profiles.

*Source:* Regulation Performance Framework: ACMA self-assessment Methodology (August 2015), www.acma.gov.au/theACMA/About/Corporate/Accountability/regulator-performance-framework (accessed 4 April 2016).

### *Practices of regulators in Peru regarding performance evaluation*

Economic regulators report different type of information, including statistics and indicators regarding budget, finance, quality of services, customer perception, inspections, amongst others, to several public institutions. Regulators also publish and share this information in their transparency portal and other electronic pages.

Regulators in Peru make public their *Strategic Plans,* which contains general and specific objectives, as well as strategies and related activities. For instance, OSINERGMIN publishes quarterly its report on performance indicators. These indicators focus on how they fulfil their scheduled activities. In the fourth quarter of 2015, for example, 80% of the activities were met, 17% were started and kept unfinished and 3% were not started. The report also disaggregates these percentages by area and publishes progress of each specific action. OSINERGMIN also carries out perceptions surveys across stakeholders that help them steer its strategic plan and the fulfilments of its objectives.

In the case of OSIPTEL, it publishes its strategic and operative plans annually on its web page. These plans include measurable indicators according to its results-oriented budget. Its indicators reflect how the market and the telecommunications users improve due to policy intervention. The progress report on these performance indicators is published biannually on OSIPTEL's web page

The strategic plans or any other planning document could be complemented by defining indicators directly intended to assess progress in achieving policy objectives. Policy objectives refer to the basic objectives of public policies such as lower prices and a wider variety of goods and services as a result of more competition, or increase in the quality of life of citizens due to better provision of services.

## *Ex ante* and *ex post* evaluation

Economic regulators incorporate several relevant practices of regulatory quality as part of their regulatory process. For instance, public consultation of regulation is a relevant practice, which helps collect evidence and identify possible side effects of the

intended regulation. However, regulators in Peru could take a more active role in adopting more sophisticated regulatory tools, which can contribute to effectively evaluate anticipated effects of draft regulation or existing regulation, and in this way ascertain whether regulations are meeting the underlying public policy objectives.

Economic regulators also conduct a cost benefit analysis (CBA) for draft regulations. This analysis is more sophisticated compared to the analysts undertaken by line ministries and agencies of the central government, which most of the time is limited to the inclusion of a statement indicating whether the proposed regulation creates additional costs to the government. As part of the CBA analysis, economic regulators in Peru identify costs and benefits qualitatively and sometimes quantitatively. However, CBA conducted by economic regulators requires specific guidelines to improve and standardise the assessment. Institutionalisation of procedures helps to maintain quality in the face of change in personnel.

In fact, evaluation of draft regulation should go beyond cost benefit analysis. Alternatives to regulation should also be contemplated, and a full description as to whether and how the regulatory option will meet the policy objectives should also be carried out. Stakeholder engagement through public consultation should also inform the assessment, as it can provide evidence to select the most desired alternative. A Regulatory Impact Assessment (RIA) system comprises all these activities.

In Peru, some economic regulators have conducted *ex post* evaluations of regulation focusing on competition effects. For instance, for tariff regulation, they have analysed competition conditions in order to inform whether to keep or remove tariffs. This type of evaluation, however, does not necessarily assess whether the regulation is meeting the underlying policy objectives. A more comprehensive analysis would include assessment of the impacts of the regulation on welfare, and on other desired societal objectives, including whether the regulation achieved its intended public policy objectives.

## Assessment

***Economic regulators in Peru have a large degree of independence to exert budget and decision making. Nevertheless, as decentralised bodies, they still have links to the executive power***

According to the own regulators and public agencies such as the Presidency of the Council of Ministries and the Ministry of Economy and Finance, Regulators enjoy full decision making independence and they fund their operation through the regulated businesses. Depending of the approval of PCM, regulators can collect a maximum of 1% of income from regulated entities after sales taxes—in fact this is the unique funding resource for regulators. This scheme represents a strength that contributes to the independence of the regulators.

Regulators still have formal dependence from the Presidency of the Council of Ministers. For instance, similar to the entities of the central administration, any reorganisation or institutional change needs to be approved by the Ministers' Council, as well as their regulation of organisation and functions. It is not clear whether these links affect the capacity of regulators to discharge their function on an independent and effective way.

***Regulator's practices on transparency and accountability are more advanced compared to the central government. However, as long as regulators exert independence, these practices should be enhanced***

Regulators, as decentralised institutions of the central government, must follow transparency obligations set by the legal framework for the Peruvian government. These obligations, however, should be enhanced whenever institutions have an independence status. This will contribute to avoiding regulatory capture and boost confidence and trust from the public, central government and regulated entities.

A similar situation applies in the case of accountability obligations for economic regulators. Currently, these regulators are accountable to the MEF in matters of budget execution, and to the PCM on strategic plans, performance indicators, amongst others. These obligations, however, should be extended to other institutions such as Congress and others stakeholders, for instance the *Council of Users*. Regulators have no obligation to submit annual performance reports to Congress, or to stand before Congress to present a report. Regulators indicate that they send report to Congress or other public institutions whenever it is required. Nevertheless, accountability practices should be systematised.

***Economic regulators regularly publish draft regulation and collect comments from the public, but there are available opportunities to improve stakeholder engagement practices. There is also publicity of meetings with regulated entities in the regulators' websites, but actions to avoid regulatory capture could be boosted***

Although some of the regulators publish the draft regulation and allow stakeholders to provide comments, further steps can be taken to ensure a systematised practice. For example; OSIPTEL in the case of draft regulations related for fixing tariffs or interconnection charges notifies mainly the parties which it considers will be affected, and OSINERGMIN decides to conduct consultation depending on the complexity of the draft regulation. Best OECD practices suggest that consultation should be carried out for all types of regulation and whenever exceptions arise, proper justification should be provided, accompanied with an *ex post* assessment once the regulation has been enacted.

Economic Regulators in Peru have a variety of forms to engage with stakeholders, but practices differ across the type of stakeholders. For instance, there is an established *Council of Users* which is consulted regularly, but for other stakeholders consultations are on demand and in an isolated manner. To avoid opportunities for regulatory capture, consultations practices have to be formalised and systematised.

With the inputs from consultation, regulators prepare a matrix of comments, and make it public. The information provided by users can be exploited further to increase the quality of regulation. They can help to define the problem that needs to be addressed more precisely, suggest alternatives to regulations, and uncover potential costs of the regulation not considered before.

### *The funding scheme of the water regulator could be enhanced further*

For the case of the water regulator SUNASS, the current arrangement of receiving income from the regulated entities is not enough to discharge its functions. SUNASS' supervised entities are small public agencies with low business income. In fact, SUNASS has indicated that the annual budget is not adequate to conduct inspections properly.

### *There is room to improve the tools used by the economic regulators to assess the degree to which they are accomplishing their policy objectives. Indicators are essential to determine whether policies are moving in the right direction*

Economic regulators report several indicators focusing on quality of the services, effectiveness in budget execution, efficiency and results of programmes, amongst others. Impact indicators, however, which should focus on how the activities of the regulators achieve the general and specific policy objectives, have not been developed.

These indicators should be an important element of the *Strategic Plan* of the regulators. Currently, this plan includes the regulator´s policy objectives, and provisions to measure progress in achieving these goals should also be added. It is important to distinguish in the *Strategic Plan* how different types of indicators contribute to the objectives: from strategic indicators measuring general objectives, to detailed indicators measuring progress in specific activities.

### *The quality of the cost-benefit analysis that regulators prepare as part of the* ex ante *analysis of draft regulation could be improved*

In general, the evidence suggests that regulators prepare cost-benefit analysis of draft regulation as part of *ex ante* assessment with more regularity and with better quality than other public agencies of the central Peruvian government. Nevertheless, the analysis and the use of standard criteria to prepare the assessment could be improved. In general, regulators do not follow guidelines when preparing cost-benefit analysis.

## Key recommendations

Peru should consider strengthening the governance of economic regulators by:

- .Review the funding scheme of SUNASS so as to ensure the necessary funding that allows it to discharge its functions and reach its policy objectives effectively, while maintaining its independence.
- Reviewing the legal links of economic regulators with central government in order to enhance decision making by regulators. This should include, but not be limited to, administrative decisions and tasks, such as internal organisation.
- Upgrading current policies to make regulators more accountable to the central government, to Congress and to the general public. This should include periodic performance reports, as well as the publication of operational policies. To this

aim, relevant indicators should be developed to help assess the achievement policy results from the regulatory interventions.

- Carrying out on a regular basis formal engagement processes with stakeholders. This should include guidelines and procedures for consultation on draft regulation and other forms of engagement with regulated entities. Rules on transparency for the treatment of comments by the public should be set.
- Introducing a system of *ex ante* impact assessment, i.e. a Regulatory Impact Assessment, for draft regulations and regulations that are subject to modifications, which should be independent from the RIA system of the central government of Peru. Measures should be taken to target resources and apply a deeper analysis to regulations with the most significant impact. As part of the consultation process of draft regulations, RIAs should be also made available to the public. RIA manuals and guidelines should be issued, and capacity building training for public officials should be provided. Regulators should establish their own provisions to ensure and asses the quality of their own RIAs, which should be independent from the oversight on RIA for the central government of Peru, to be carried out by the co-ordinating council on regulatory policy recommended in this report.

# Notes

1. See Article 28, Organic Law of the Executive Branch.
2. Official website: www.sunass.gob.pe.
3. Official website: www.osiptel.gob.pe.
4. Official website: www.osinergmin.gob.pe.
5. Official website: www.ositran.gob.pe.
6. See Article 32, Organic Law of the Executive Branch.
7. See Article 10, Framework Law on Regulatory Agencies for Private Investment in Public Utilities.
8. After Value Added (VAT) and Municipal Promotion Taxes.
9. In the case of SUNASS, the fines are transferred to the Public Treasure. In the case of OSIPTEL, fines collected are transferred to the Investment Fund on Telecommunications (FITEL)
10. Other restrictions on the everyday activities of the regulators include salary caps, restrictions on capacity building and training, and restrictions on international travel by regulators' staff.
11. The website of the MEF provides this information, but it is not replicated in the websites of the regulators.

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